

2013

2013 Report from the Dean

IIT Chicago-Kent College of Law

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On the Occasion of the 125th Anniversary
of IIT Chicago-Kent College of Law

2013 REPORT FROM THE DEAN

Then & Now: Stories of Law and Progress

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Then & Now:
Stories of Law and Progress



IIT Chicago-Kent College of Law
ILLINOIS INSTITUTE OF TECHNOLOGY

Then & Now: Stories of Law and Progress

*2013 Report from the Dean on the Occasion of the 125th Anniversary
of IIT Chicago-Kent College of Law*

Lori Andrews and Sarah Harding
Editors

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Foreword

This Dean's Report celebrates our law school's storied past. Over the past 125 years, Chicago-Kent has graduated students who would later become leading jurists, trial lawyers, and heads of corporations and not-for-profits, not only here in the United States but around the world. Graduates have also served as governors, as members of Congress, as legal service lawyers, and in a wide variety of other public interest capacities.

In our first generation, we proudly opened our doors to minorities who were denied a legal education elsewhere. And we have contributed to legal education with a series of innovations, from introducing computers into legal instruction to developing the first three-year required curriculum for legal writing, and from establishing the first fee-generating clinical program in the nation to launching an incubator for recent graduates interested in practicing law on their own. Our programs in intellectual property, advocacy, and law and the workplace have few peers.

We also have been blessed with fabulous faculty members, a number of whom have marked the occasion of our anniversary by exploring some of the continuities and discontinuities in the legal terrain spanning the lifetime of the school. I trust you will enjoy their musings, and I look forward to working with all of you as we embark on the next, even-more-terrific 125 years.

Dean Harold J. Krent



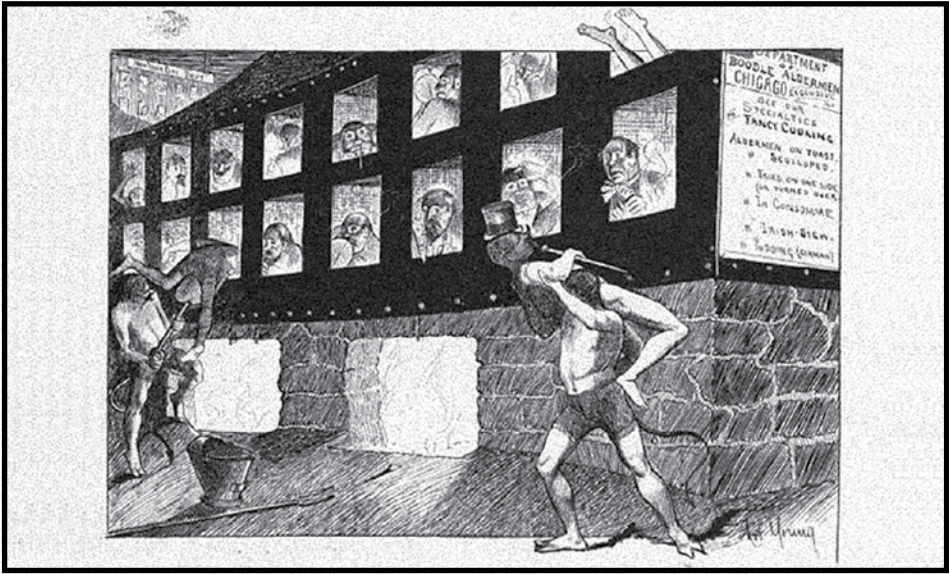
Introduction

When students entered the chambers of Judge Joseph Meade Bailey in 1888 for the educational adventure that was later to become known as Chicago-Kent College of Law, they were surrounded by volumes of legal cases, but finding precedents was hit or miss since no one had yet created an indexing system. Chatter inside the chambers might have centered on the infamous “Great Boodle Trial,” one of the first public corruption trials in Chicago, or the new Rookery Building being built just a block north on LaSalle Street. More serious discussion might have turned to basic questions about the Constitution and the highest court of the land. Should the Bill of Rights be applied to the States? Should everyone have the right to have their cases heard by the U.S. Supreme Court?

Outside the judge’s chambers, students were faced with a world of new technologies (the telegram, the portable camera, skyscraping architecture) and fast-evolving legal questions. Rapid industrialization and the monopolistic tendencies of major enterprises, particularly the railroads centered in the Midwest, were pushing Congress towards the passage of a pathbreaking “anti-trust” law. Women were permitted to enroll in the early law classes held in Judge Bailey’s chambers, and they were increasingly involved in providing legal aid to the poor through the Protective Agency for Women and Children but were denied the right to sit on juries. And while Albert Goodwill Spalding, owner of the Chicago White Stockings, and John Montgomery Ward, the nation’s most famous shortstop, were battling over player labor issues, post-Civil War tensions were still simmering in a scandalous case that pitted California against the President.

Since those early classes in the late nineteenth century, IIT Chicago-Kent graduates have mastered the law and served their clients in all 50 states and around the world. They have joined big firms, formed their own firms, created businesses, been appointed to the bench, served as legislators, argued in the Supreme Court, joined the media, and won awards for their ideas and their representation. They have changed the law and changed the world. And now, 125 years after the law school was founded, we celebrate the tenacity and success of this great Chicago institution and its alumni with tales spanning 125 years of law and change.

Professors Lori Andrews and Sarah Harding



"The Boodle Aldermen: Each sat in his particular oven," cartoon by Art Young, 1892.

CHICAGO'S "GREAT BOODLE TRIAL"

Todd Haugh

In late August 1887, as some of Chicago-Kent College of Law's first students were beginning their studies in the chambers of Judge Joseph Bailey, a bottle carrying a handwritten note bobbed across Lake Michigan. Found on the shores of Grand Haven, Michigan, the bottle and its contents were rushed to a reporter for the then-fledgling *Chicago Daily Tribune* newspaper. Thrilled to have scooped the competition, the *Tribune* published the note the next day as an exclusive:

To my friends in Chicago: A few more hours and I will be safe through the straits and in Canada.

Sheriff Matson, please accept my thanks for the bath, but I have concluded it in British waters. Oh Ed, I wish you were here with me! Goodbye till we meet!

The note's author was William J. McGarigle, and he had reason to gloat. A former Cook County Commissioner and warden of the Cook County Hospital, McGarigle had successfully fled police custody after being convicted on corruption charges and sentenced to three years in prison. McGarigle escaped by duping the Sheriff of Cook County, Canute Matson, into allowing him a visit with his wife and kids at their

Lakeview home. After asking to take a bath to “freshen up,” McGarigle slipped out a window, made his way to a schooner docked along the south branch of the Chicago River, and sailed out into the lake and through the Straits of Mackinaw to Canadian waters.

Slipping past the patrol boats, knowing he was about to be a free man (Canada had no extradition treaty with the U.S. at the time), McGarigle must have chuckled as he threw the bottle overboard. When found, the note would not only put a thorn in the backside of Matson and the entire sheriff’s office, but it would surely put a smile on the face of his friend, Edward McDonald. The “Ed” from the note, McDonald was McGarigle’s co-defendant, fellow county commissioner, and now former cellmate. Keeping McDonald in good spirits hadn’t been easy as the summer humidity in their cells climbed and a transfer to the Joliet Penitentiary loomed, but McGarigle did his best. The truth was, Ed McDonald’s happiness mattered. As a longtime board member and the Cook County Hospital’s engineer, he knew every detail of the swindles that landed them and the other county commissioners in jail. But more importantly, he was brother to Michael “Big Mike” or “King Mike” McDonald, boss of the Chicago Democratic Machine and the city’s first politician gangster.

McGarigle, Ed McDonald, and Big Mike McDonald form the nucleus of a fantastic story of proudly corrupt politicians, seemingly righteous reformers, bagmen, kidnapers, and suckered citizens, revealed through the testimony of the “Great Boodle Trial” of 1887. The “most sensational corruption scandal of the late nineteenth century,” the Boodle Trial offers a glimpse into the crooked machine politics of early Chicago and the equally underhanded tactics of overzealous reformers. Called by some a “corrective antidote” to “[a]n epidemic of fraud,” the trial helped galvanize the reform movement in Chicago, proving that even well-connected Chicago politicians could be brought to justice. At the same time, it demonstrated the lengths—some say necessary; others say illegal—reformers would go in the pursuit of their goals. Finally, the trial reminds us of just how entrenched corruption is in Chicago politics. As dramatic as it was at the time, the trial may have been the beginning, not the end, of Chicago’s legacy of corruption.

Chicago’s Great Boodle Trial, which began on June 4, 1887, was actually two “prolonged and tedious trials.” The first trial pitted State’s Attorney Julius Grinnell against McGarigle and Ed McDonald; the second was against over a dozen other commissioners and private contractors in an “omnibus” pro-

ceeding. Both cases centered around the same allegations of public corruption. According to prosecutors, a ring of crooked commissioners took control of the Cook County Board sometime in the early 1880s. If a company wanted to do business with the county, it had to pay the ring a “commission” for the privilege. What we today call a “pay to play” scheme, this arrangement allowed dishonest commissioners and business owners to get rich off county contracts secured through bribes and inflated by padded invoices. Ed McDonald helped organize the ring and set up the schemes, while McGarigle, acting as the bagman, collected the bribes and kickbacks—the “boodle.” Everything led back to Big Mike McDonald, the man who controlled Chicago’s Democratic Party, all county patronage, and the county board.

A sampling of the boodlers and their schemes, recounted in vivid detail through the two trials, shows the power of early Chicago machine politics and the depth of the commissioners’ individual greed. There was Harry “Prince Hal” Varnell, a gambler and saloon owner appointed warden of the Cook County Insane Asylum. Varnell promptly set up a private office and home on the grounds of the asylum and outfitted them with “Persian rugs, Brussels carpets, and lace curtains.” He ordered expensive foods and paid for the living expenses of his neph-

ews, cousins, and friends, all using taxpayer money. The asylum’s drug store and infirmary served as the “clubhouse” for the ring of commissioners.

James “Buck” McCarthy joined the county board in 1884. A high school dropout, former boxer, and meat packer in the Chicago stockyards, McCarthy’s main qualification for being a commissioner was his friendship with Big Mike McDonald. McCarthy’s protégé was Charles Lynn, who served as a deputy sheriff and commissioner. Lynn admitted to joining the board “solely for the money he could extort,” recounting his “scorn” for Chicago industrialists who refused to pay the ring its expected commissions. Charles Frey, another McDonald-controlled commissioner, was warden of the county poorhouse. He bought silk underwear costing eighty-five dollars, charging it to the county as a bale of muslin.

And then there was McGarigle. Warden of the county’s 600-bed hospital for the poor, McGarigle’s office was adorned in the finest imported damask drapes. China spittoons flanked his office door. He even had a private horse stable built on hospital grounds for his personal use. In one of the more farcical accounts, it was reported that McGarigle had 24 lightning rods mounted on a hospital tool shed—one “on every chimney, every alcove, every corner, and every crevice.” The lightning rods



Several men sitting on benches along a hallway in the Cook County Hospital, 1911, DN-0008937, Chicago Daily News negatives collection, Chicago History Museum.

were installed by Varnell, a business agent of the manufacturer.

As the boodlers siphoned off tax dollars to fund their lavish offices and private dinners, county patients suffered. In the Cook County Hospital's contagious disease ward, "a cramped, fetid, 18-by-40-foot room," patients fought for space on only six beds, often lying side by side on the floor. Unlike the \$3.00-a-dozen strawberries and grapes Varnell ordered for his party guests at the clubhouse, patients were served spoiled meat. The nurses and orderlies often showed up to work drunk. Similar conditions were found at the asylum and the poorhouse. Newspapers reported that "the poor, the lunatics, and the sick have fared none too well, but those who have been hired to take care of them live in luxury."

Not surprisingly, the boodlers' largess eventually garnered notice. In 1886, the county budget faced a staggering one million dollar deficit (approximately 25 million in today's dollars), which was directly tied to the reckless spending of the corrupt commissioners. This rallied the few reform-minded commissioners on the county board, including J. Frank Aldrich, who was also a member of the reform-based Union League Club of Chicago. The Union League Club joined causes with the Citizens' Association, another reform group, whose membership included George Pullman, one of the wealthiest and most powerful industrialists in the country. Pullman and the other reformers brought suit against the county board to enjoin it from entering into more dubious

contracts—the first was to drill an unnecessary artisan well at the poor-house—thereby beginning the “reform movement in county affairs.”

Despite the laudable goal of ending the “epidemic of fraud” in county politics, the reformers were not exactly above reproach in their tactics. In fact, some of the reformers’ methods rivaled those of the boodlers. After filing their civil suit, the reformers funded a private prosecution of the ring of commissioners. Of the \$150,000 raised (over three and a half million dollars today), at least \$30,000 went to the Mooney and Boland Detective Agency for the purpose of reviewing county invoices and conducting nonstop surveillance of county contractors suspected of paying bribes. When the invoices the detectives had access to didn’t show evidence of bribes, the reformers had ones that did stolen from a county safe. The “confiscated” documents helped lead to a raid on the commissioners’ clubhouse, which uncovered additional incriminating evidence.

Now all the reformers needed was a witness. A corrupt contractor, a plumber named Nic Schneider, gave the reformers what they were after. Drinking one night at Big Mike McDonald’s four-story Clark Street gambling parlor and saloon, “The Store,” Schneider loudly toasted to “county contracts,” saying, “I am rich and by gracious in two years I shall be as rich as anybody.” Joining

him in the toast was a county commissioner. Two Mooney and Boland detectives, who had been surveilling Schneider, witnessed the toast. When Schneider left the tavern, the detectives followed. Schneider never made it home that night. Disappearing with him were his business papers, including the false invoices he wrote to pad county contracts and evidence of the commissions he paid to secure county work.

The ring of commissioners learned through their own private detectives that Schneider was being held by the reformers. Based on a bogus warrant issued for Schneider’s arrest, the commissioners sent nine policemen to recapture him, but they were turned away after a struggle. Schneider, possibly bound and gagged in a second floor room, could hear the “ruckus” below as the men fought over him. He turned witness for the prosecution soon after and fled out of state, escorted (some might say restrained) by two private detectives.

The reformers may have felt justified using such tactics to secure evidence against the boodlers given their control over the jury system. At the time, the grand jury—the only body that could issue an indictment formally charging a defendant with a serious crime—was selected by the county commissioners. Each commissioner wrote two names of prospective jurors on blank cards, which were then drawn from a hat.

When a new grand jury was chosen, one of the corrupt commissioners simply picked cards that had been dog-eared by the others in the ring. This system, though rudimentary, had been used effectively to shield machine politicians from prosecution for over a decade. In fact, when asked about the possibility of indictment, Buck McCarthy commented, "There are only two powers over the [county] board, one is the Almighty, the other the grand jury, and we get to draw the grand jury."

McCarthy's confidence was misplaced, however. After reformist commissioner Aldrich witnessed the loaded draw, the reformers were able to convince a judge to empanel a special grand jury. The special grand jurors, "honest and true men who refused to be bribed or intimidated," promptly indicted the ring of commissioners and private contractors on 106 counts of public corruption. The reformers had thus broken the "power of puppet master [Big Mike] McDonald and his commissioners to control the selection of grand juries that had protected them from criminal indictments."

After unsuccessfully moving for a change of venue on the grounds that the prosecution had been improperly funded by private citizens, the Boodle Trial was underway. The evidence against McGarigle and Ed McDonald was overwhelming. "Witness after witness was placed on the stand to prove that [they] had

systematically robbed the taxpayers of this county for a long time." Plumber Nic Schneider became the prosecution's star. Notwithstanding accusations of perjury by the defendants, Schneider's testimony, supported by his false invoices, showed that Ed McDonald was connected with four firms that overcharged the county for goods and labor and that McGarigle collected and disbursed the bribes and stolen money. Both defendants testified in their own defense but offered contradictory testimony "of the flimsiest character."

On June 18, 1887, the jury found both men guilty. Later that summer, the "other dominoes fell" during the omnibus trial. When the verdicts were read, "the ball game at White Stocking Park was interrupted while the people cheered." The penalties for most defendants were substantial, ranging from thousands of dollars in fines to three years in the penitentiary for McGarigle and Ed McDonald. However, a few received smaller fines after agreeing to help the prosecution and paying restitution. Buck McCarthy, who was fined just \$1,000 amid allegations that he had influence over one of the jurors, told reporters that he was "disappointed and disgusted" with the verdict. (McCarthy went on to be elected to the Chicago City Council.)

Of course, McGarigle's flight to Canada meant he was never fully brought to justice. After living in Banff, British Columbia, for two

years, where he bought into a livery business and invested in a hotel, he cut a deal and returned to Chicago. He eventually ran a tavern in the Clark Street vice district controlled by Big Mike McDonald. Ed McDonald didn't fare as well. While awaiting transfer to the penitentiary, his nine-year-old son died after falling from a fire escape at the Cook County Hospital while playing with friends. The

Assistant State's Attorney John Bensley explained it this way: "In Mike McDonald's case, an indictment could not be framed to hold. When a man lays all his plans coolly and deliberately with the express purpose, apparently, of preventing any tracing of crookedness to his door it is an extremely difficult thing to get him with legal evidence." Big Mike explained it a little differently, though the senti-

THE BOODLERS CONVICTED

TWO PROMINENT CHICAGO POLITICIANS TO GO TO JAIL.

CHICAGO, June 18.—William J. McGarigle, Warden of the Cook County Hospital, and Edward S. McDonald, engineer of the same institution, and brother of "Mike" McDonald, the notorious gambler, were convicted to-day in

fall was caused by loose boards that hospital workers had failed to secure or seal off. Afterward, Ed McDonald "lapsed into a deep depression." He served his time in Joliet but was effectively finished in Chicago politics.

And what of Big Mike McDonald, the boss of the boodlers and the architect of their schemes? He was never charged or tried as part of the Boodle Trial; the grand jury didn't even vote on whether to indict him.

"The Boodlers Convicted," New York Times headline, June 19, 1887. Facing: Photo of Michael "Big Mike" McDonald and another man, 1907, DN-0005146, Chicago Daily News negatives collection, Chicago History Museum.

ment was the same. Joking to reporters, he said, "[A]fter it's all over I show 'em a pretty clean pair of heels and I'll do it this time or I'm very much mistaken." He added, "Most everybody's a boodler nowadays, you know."

Big Mike McDonald remained on top of the Democratic Party for more than a decade longer, controlling an empire of gambling parlors, saloons, and prostitution houses, while directing city and county patronage. The Boodle Trial did not slow his operations. The same year of the trial, he was reported to have ordered city aldermen under his control to approve

a \$200,000 contract for applying “preserving fluid” to City Hall. The fluid, which was “guaranteed to keep the stately building intact for a hundred years,” washed away in the rain two days later. The World’s Fair that took place in Chicago in 1893



put more millions into Big Mike McDonald’s pockets as city contracts swelled and armies of tourists gambled and drank at The Store. It was at this time that McDonald supposedly coined the phrase, “There’s a sucker born every minute.” Big Mike retired to his Ashland Boulevard mansion in the early 1900s, content to let the next generation of boodlers and gangsters try its hand in Chicago.

The legacy of the Great Boodle Trial and the reform efforts it epitomized is decidedly mixed. In some ways, it was a significant victory for early Chicago reformers. The Boodle Trial was a very public demonstration that the city’s machine politicians—at least most of them—were not above the law. All told, nine commissioners and county contractors who faced trial were convicted and sentenced to two years or more in jail; four others were convicted and fined the maximum allowed under statute. Up to that

time, no politician had received such harsh punishment for “boodling.”

The commissioners’ convictions, even for those receiving only fines, also meant they would be automatically removed from the county board. By “turn[ing] the rascals out of

the County Board and brand[ing] them forever as convicted public swindlers,” the trial ended most of the commissioners’ political careers, and more importantly, Big Mike McDonald’s control over county contracts. The *Tribune* called the trial “the most successful assault on public crooks to that date.”

More broadly, the trial and the scandal leading up to it galvanized Chicago’s reform-minded citizens, kick-starting the city’s reform movement. To successfully investigate and prosecute the ring of commissioners, two reformist groups—the Union League Club and the Citizens’ Association—joined forces. The alliance brought activist industrialists, politicians, and judges together, and allowed for great sums of money to be raised to combat corruption. The Boodle Trial was just the first success of the reformers. After the trial ended, reformers pressured the state legislature to review how jurors were selected in Cook County, leading to

a revamped jury system in which county commissioners no longer selected grand juries. This allowed prosecutors to bring public corruption cases under a fair system. With the help of a press corps intent on publishing more exposés like those leading up to the Boodle Trial, reformers went on to successfully investigate and prosecute bail-bond fraud and ghost payrolling. Some of these reform movements continue today.

Yet, to achieve their goals, the reformers became separated from the corrupt commissioners by only a matter of degree. While calling for the prosecution of Big Mike McDonald—"the managing and directing thief whose influence has cast such a blighting shadow over public affairs in this county"—reformers kidnapped witnesses, stole documents from a county safe, and privately funded the criminal indictments of their adversaries. The reformers' "ends justifies the means" rationalization, which they undoubtedly employed, rings as hollow as McGarigle's defense that the prevailing system was at fault for his crimes—that he just went along with the boodling because everyone else did. While there are safeguards in place today to guard against the use of such "impure methods," many contend the prosecutions of recent Chicago politicians have been motivated less by enacting genuine reform and more by furthering political gain. One current Cook County

Commissioner, William Beavers, awaiting trial for allegedly failing to pay taxes on money he took from his campaign fund (and used to pay gambling losses, among other things), has accused prosecutors of indicting him as retribution for refusing to wear a wire against John Daley, a former commissioner who is brother to Richard Daley, Chicago's longest-running mayor.

The best measure of the Boodle Trial's impact is, of course, whether it changed the culture of corruption in Chicago politics. On that score, the trial has had little lasting impact. The headlines of today's *Tribune* read much as they did 125 years ago. Month after month, colorful Chicago politicians fight indictment (some from their county board seats) for schemes that would get an approving nod from Big Mike McDonald. Beavers is the most recent, and possibly the most odd (after being indicted, he called the United States Attorney prosecuting him a "rooster with no nuts"), but he is by no means alone. On its way to earning the distinction of being the most corrupt city in the country, Chicago has seen five of its governors imprisoned, over 30 aldermen indicted and convicted, and countless other public officials investigated. At the top of that list is former Governor Rod Blagojevich, who is currently serving a 14-year prison term for attempting to auction off President Barack Obama's vacant United States Senate seat for

personal gain. Wiretaps of Blagojevich recorded him saying, “I’ve got this thing and it’s f—ing golden, and . . . I’m just not giving it up for f—in’ nothing.”

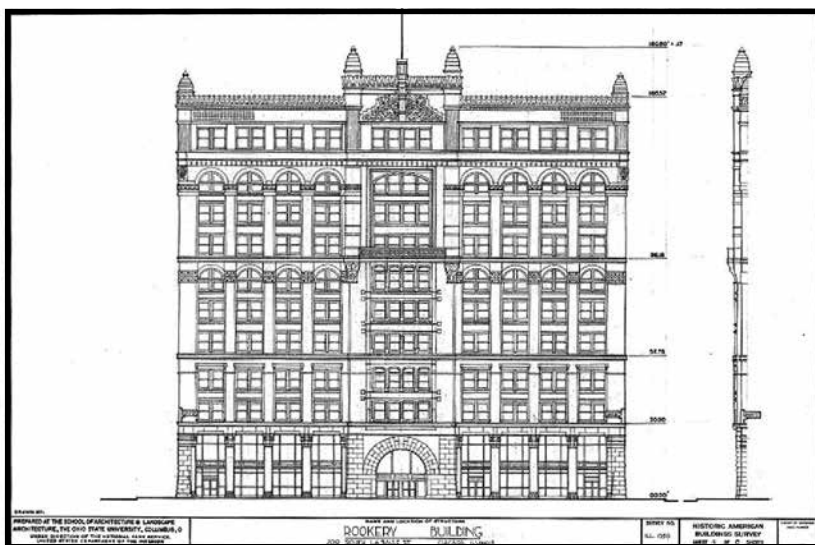
It could be argued that these prosecutions even taking place, some against officials at the highest levels of government, proves that the Boondle Trial has had a lasting impact—the trial showed generations of reformers that political corruption could be combated in Chicago in a meaningful way. Others will more cynically say that for every crooked politician prosecuted, another will take his place, and that the most well-connected crooks—the crafty bosses like Big Mike McDonald—always find a way to operate above the law. While the truth is likely somewhere in between, the Great Boondle Trial reminds us most of all that as long as there is boondle, there will be men trying to take it. As McGarigle remarked a few months before his conviction, “I don’t care if the same

system prevailed in heaven, there would be boondlers. The temptation is too great. . . . Men are but human[.]” ♦

Sources and Further Reading

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Todd Haugh graduated with honors from Brown University and received his law degree cum laude from the University of Illinois College of Law. Before coming to Chicago-Kent, he served as a Supreme Court Fellow at the Supreme Court of the United States and practiced white collar criminal defense at Winston & Strawn LLP and Stetler, Duffy & Rotert, Ltd. Professor Haugh’s research interests include white collar crime and sentencing.



Rookery Building, Historic American Buildings Survey, Library of Congress.

THE ROOKERY BUILDING AND CHICAGO-KENT

A. Dan Tarlock

Chicago-Kent traces its origin to the incorporation of the Chicago College of Law in 1888. Chicago-Kent's founding coincided with the opening of the Rookery Building, designed by the preeminent architectural firm of Burnham and Root. There is a direct connection between the now iconic Rookery Building, located at Adams and LaSalle, and the law school building further west on Adams. There is also a more indirect but interesting connection between the first and second schools of Chicago architecture and Daniel Burnham's vision of the modern city. Architects, but especially Daniel Burnham, helped make and

sustain Chicago as a world city, thus making it an attractive and exciting place to practice law to the benefit of all law schools in Chicago including Chicago-Kent.

The Rookery is now a classic example of the first school of Chicago architecture, which helped shape modern Chicago and continues to make Chicago a special place, despite decades of desecration of this rich architectural heritage. The Great Fire of 1871 destroyed the Loop and the newly developed residential areas to the north. It did, however, narrowly miss the lumber yard, which occupied the site of the current law school. Architects were immediately

attracted to Chicago because of the opportunities to rebuild the city. The skyscraper was perfected here, and this technological innovation, along with the telephone and Otis Elevator, created the modern office city by separating industrial production from its administration. By 1888, Chicago, along with Buenos Aires and São Paulo, was emerging as a major example of a modern city unconstrained by any significant urban past. The city had grown from about 100,000 persons when Lincoln was nominated for President, a few blocks from the current law school, to one million inhabitants and counting.

Chicago had surpassed Philadelphia and became America's second city. Chicago's location as a rail and water hub enabled it to become the processing center for the agricultural bounty of the Midwest and Great Plains as well as the distribution center for this region. For a brief period of time, wealthy Chicagoans used their new wealth and power to patronize a progressive group of architects to build modern, forward-looking cathedrals of commerce.

A group of Chicago architects, led by Dankmar Adler, Louis Sullivan, John Root, Daniel Burnham and later Frank Lloyd Wright, developed a distinctive style of architecture geared to the technological innovations that were changing the nature of business. The Rookery is a perfect example. The walls were

partially load-bearing, but the interior used the state-of-the-art steel frame, developed by William Jenny, to permit it to become the tallest building in Chicago. The building is a mix of early modernist and retrospective styles. The walls of large windows allowed maximum use of light because of the dimness of the 20-watt bulbs powered by Commonwealth Edison's first loop generating station across the street. The exterior building is also an example of Chicago Romanesque. This style, whose distinctive feature was the arch, was based on pre-Gothic Romanesque architecture in southern France. Initially adopted by Frank Richardson in Boston, the great Louis Sullivan brought it to Chicago. The Auditorium Theater, which opened in 1889, is the best surviving example.

After the elite lost interest in "modern architecture," innovation languished in Chicago until the post-World War II modernist school emerged. Until the 1980s, postwar Chicago architecture was a monument to Mies van der Rohe. Fleeing Nazi Germany, he ultimately settled in Chicago, headed IIT's then Department of Architecture, designed its landmark campus, and more generally helped make the German Bauhaus the dominant form of post-World War II Chicago architecture.

The law school's current building, which opened in 1992, is a synthesis of the two great schools of Chicago architecture. Its scale and facade re-



"Rookery Building, exterior," photo from 1891, Images of America Collection, Frances Loeb Library.

call the post-fire Prairie School, especially the Rookery Building. However, the incorporation of an arch into early designs was rejected as disproportionate to the building. Not only is it about the same height, it was designed by Holabird and Root, the successor firm to Burnham and Root. The relatively austere stone facade, rather than a pure steel and glass frame characteristic of Mies's main campus buildings, echoes the Rookery in both style and underlying philosophy. And, like the law, it both respects the past and looks to the future. Burnham rejected the argument of Louis Sullivan and Frank Lloyd Wright that America needed a distinctive style of architecture. Rather, "Burnham and his allies," as

the *Encyclopedia of Chicago* explains, "believed that the sometimes frantic quest for 'American-ness'—the obsession with New World originality and horror of all things European—was itself a kind of insecurity, and that maturity would consist in an acknowledgment that America was not culturally isolated from the rest of the world. Burnham and his associates saw the United States as a rightful heir to the traditions of Western culture."

Daniel Burnham's larger legacy for Chicago and its vibrant legal community is twofold. First, Prairie School architecture both symbolized Chicago's emergence as a world city in the late nineteenth and early twentieth century by allowing it to drain

the surrounding region of both resources and talent, legal and otherwise. This legacy along with Burnham's partially realized 1909 plan also helped Chicago to evolve into a major financial center, after its original industrial base of Chicago eroded after World War II. The concentration of law firms to serve Chicago's economy provided employment for thousands of lawyers.

The second legacy of Burnham's plan is much darker but also benefited Chicago lawyers. The much hailed plan envisioned Chicago as a great city in the mold of Paris or Imperial Vienna. But the plan primarily concentrated on a magnificent core and lakefront for the wealthy. The unruly, poor, polluted, and dangerous rest of the city, home to the waves of immigrants from around the world and migrants from other parts of the country, was depicted only by endless low-rise, uniform blocks. In other words, the city that actually existed was largely ignored. It was left to others to deal with what was in fact happening on the streets of Chicago. In the twentieth century, Chicago's continuing attempts to deal with urban problems such as racial segregation, urban poverty, substandard

housing, rampant corruption, and juvenile and gang violence have provided endless opportunities for lawyers and future lawyers trying to obtain justice for individuals caught in the net of poverty, corruption, brutality, and discrimination equally characteristic of Chicago, including a young Columbia University graduate (and Chicago-Kent commencement speaker), Barack Obama. ♦

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The Legal Aid Society, established in 1905 from a merger of PAWC and the Legal Aid Bureau, photo by Charles J. Bernauer, 1919, ICHi-36161, Chicago History Museum.

INVENTING LEGAL AID: WOMEN AND LAY LAWYERING

Felice Batlan

When we think of extraordinary nineteenth century legal institutions and innovations, we generally do not think of women. In fact, in 1875, the United States Supreme Court ruled that Illinois' refusal to admit women to the bar did not violate the newly passed Fourteenth Amendment of the U.S. Constitution. Yet remarkably, in 1885, women in Chicago created the Protective Agency for Women and Children (PAWC), which was one of the very first organizations in the country to provide free legal aid to the poor.

The PAWC began inauspiciously

and indirectly. In 1876, Caroline M. Brown, a wealthy woman and mother of two children, founded the Chicago Women's Club (CWC) by inviting 21 women to meet in her living room to learn about and discuss the day's pressing social, political, and cultural issues. Brown was acutely aware of the limited sphere in which elite women could maneuver respectably and worried that some might take a dim view of the club. Yet, in the aftermath of the disastrous 1871 fire, Chicago was a particularly hospitable place for such a group, as women had created organizations to provide charity and

relief to victims of the fire. Thus a tradition of middle-class and elite women's organizing already was beginning to develop in Chicago.

One of the first projects of the CWC was to place a woman night matron in each police station, and the club hired and raised funds for the matron's salary. The issue of having women police matrons was one embraced by numerous women's organizations across the country. It was an appropriate women's issue because it involved the supervision of working-class and poor women under the rationale of protecting such women's virtue from male prisoners and from policemen (often immigrant men). Responsibility for the matron gave CWC members cause to visit the jails as well as to follow jailed women's cases through court proceedings. They observed firsthand the treatment of poor women and girls in Chicago courts as defendants, witnesses, and victims.

These experiences underlay the CWC's decision to create the Protective Agency for Women and Children in 1885. The PAWC announced as its objective: "To secure justice for women and children, to give legal counsel free of charge, and to extend moral support to the wronged and helpless." Significant to notice here is that the PAWC limited its clientele to women. In fact, gender was fundamental to how members of the PAWC viewed themselves, constructed their roles and du-

ties, and defined the problems that they sought to solve. According to the PAWC, elite and middle-class women had a unique responsibility to protect poor and working-class women from a host of dangers and injustices. Central to the PAWC's ideology was the argument that men as a whole had failed to create a moral and just society. Instead, men had constructed a world that was rife with injustices to women and governed by a corrupt political system in which men put self-interest before the public good.

Charlotte Holt was hired by the PAWC as the organization's superintendent. She ran the office and interviewed women who sought aid. She and her assistants, board members, and volunteers then would investigate cases and attempt to settle them. A male attorney would become involved only if a lawsuit was filed, which was a rare event. Each year, the number of clients to whom the PAWC ministered grew exponentially. In its first year, the PAWC handled 156 cases, in its third year 1,145, and by 1905 over four thousand. There were few rules regarding the types of cases that the PAWC would take. Rather it functioned flexibly and often improvised, meeting needs as they arose. Thus unlike the practice of most later legal aid societies, the PAWC did not have eligibility requirements, did not require that a client be worthy, and was entirely unconcerned that it might take cases

away from attorneys. As the PAWC's superintendent stated, "We do not make any rules, but judge of each case as it comes to us."

The two largest categories of cases were wage claims involving women whose employers had failed to pay them and domestic relations claims. In wage cases, Holt and other board members, using their influence and persuasion through letters and personal visits, pressured employers to pay such wages. This form of conciliation was used so often that the PAWC dubbed it "White Mailing." The "white" was intended to imply that it was done in the name of justice, morality, and the public good, as opposed to blackmail, which was done for self-interest.

The bulk of the PAWC's domestic relations cases raised issues of abandonment and/or nonsupport of wives by husbands. These cases went to the heart of the PAWC's belief in the absolute obligation of a husband to support his wife and children. In a typical case, a woman would appear at the PAWC's office claiming that her husband disappeared weeks ago, leaving her penniless. Now the landlord was demanding rent, and the furniture was being repossessed. At times, the husband was close by living with relatives and at other times he had traveled far away. Often the wife would have some sense of where the husband was staying and where he worked. The PAWC would take the case, search for the husband,

threaten him with a lawsuit for failure to support, and collect support payments for the wife. If the husband did not agree to pay, the PAWC often would convince his employer to pay wages directly to the PAWC for the benefit of the wife. Actions such as these combined the threat of litigation with public humiliation by making visible a man's failure as a breadwinner. In the small number of cases where these methods failed, the PAWC might file a lawsuit against the husband for nonsupport. Meanwhile the PAWC also would negotiate with the landlord and furniture dealer for lower or postponed payments. The PAWC rarely initiated lawsuits and this was for good reason. A lawsuit would require that the PAWC's male lawyer become involved. Even more important, the PAWC had little faith in the courts and did not believe that courts could actually deliver justice.

The PAWC's vision of legal aid went well beyond representing plaintiffs in claims for monetary damages. Rather the PAWC devised for itself the mission of overseeing the court system's treatment of poor and working-class women's cases involving sexual assault. The PAWC declared that they intended to protect such women from a legal system that too often failed to take seriously cases in which women made claims of rape or sexual abuse. Rather, courts and the state dis-

missed charges, charged defendants with minor offenses, or even found defendants innocent in cases where significant proof of abuse existed. The PAWC argued that defendants' lawyers endlessly delayed cases and inappropriately influenced judges. If a trial occurred, the defendant's lawyer humiliated the victim by attacking her character and chastity. Likewise the state's attorney, who was at best overworked and apathetic, could not be relied upon to prosecute cases fully.

Leaders of the Agency also believed that the court system was filled with justices of the peace and police magistrates who had obtained their appointment through political connections and were often corrupt. By contrast with corrupt non-elite justices of the peace, police magistrates, and lawyers, PAWC members considered themselves more competent and certainly more virtuous. In 1887, the PAWC confidently wrote a letter to state appellate judges regarding the deplorable state of the lower courts. The letter declared, "We have had cases in which we believe political influences have governed the Justices. We have had cases in which sympathy with vice seemingly decided the question. We have had cases in which the attorney for the accused controlled the Justice, and it was deemed impossible to secure a fair hearing." They further complained of intentional delays, mind-numbing technicali-

ties, discourteous treatment by court personnel, crowded courtrooms, and magistrates' and court officers' lack of sympathy with or concern for poor women. The letter urged the appellate justices to appoint only the most qualified attorneys to judicial positions. Regarding the issue of qualifications, the PAWC's complaints were laden with contradictions. Even its most powerful and active members did not have formal legal training, and the PAWC's mission was to exert their own influence over judges.

Part of what the PAWC found so objectionable was that police magistrates and other lower court judges were not only deeply ensconced in politics but were also non-elite, often immigrant men. The PAWC's attack on court officials reflected their larger fear of the power that immigrants and non-elite men, through political connections and the system of Chicago's ward bosses, had obtained. By contrast with the supposedly illegitimate power exercised by court officials, the members of the PAWC saw themselves and the power that they exercised to be earned, natural, and above reproach.

When the PAWC learned about a case of sexual violence, it became involved in multiple ways, including conducting its own investigation, gathering evidence, and speaking with judges and attorneys. At times, PAWC members would pressure the state's attorney into allowing

the PAWC's own attorney to prosecute cases. In their own words, they would act "the sister's part." One of the PAWC's best-publicized and most visible tactics was to appear *en masse* in courtroom proceedings involving cases of sexual assault. In doing so, they functioned as judicial watchdogs whose presence was intended to shame court officials and lawyers into proper behavior. PAWC members walked a fine line in assuming this role, as truly respectable women rarely appeared in court, which all recognized as a masculine space. Chicago's police courts were rough-and-tumble places—crowded, noisy, filled with smoke, and teeming with defendants of all sorts. These were hardly places where ladies appeared. Responding to the PAWC's actions, some court officials declared that the courts, especially police courts, were not an appropriate place for respectable women. Such judicial opprobrium only increased the PAWC's tenacity and paradoxically augmented the impact had by the public nature of their protests. As the PAWC explained, "The presence of a delegation of reputable women, women of social position and influence, changes the moral tone of Police court, and imparts courage to a timid girl, whose very innocence confuses her, in the presence of so many strange men."

As PAWC members invaded the courtroom, they also began to question substantive and evidentiary laws

regarding sex crimes. Particularly infuriating was how defense lawyers raised issues of a victim's consent and used past sexual conduct to demonstrate consent, even when crimes involved girls. The PAWC strongly condemned as hypocritical the double standard that permitted men to have sex outside marriage while condemning women who did so. Connecting this understanding to the legal arena, they sought to make a woman's chastity and morality irrelevant to the question whether she was the victim of a sex crime. As members continued to attend court, they began to assert that the courts' unfair treatment of women in cases regarding sexual violence was not caused only by individual men's behavior. Rather, the PAWC insisted, this unfair treatment was engrained into law and required the enactment of new laws that would exclude evidence of a women's chastity or previous conduct. It explained, "[I]mmorality should be no hindrance to legal rights in one sex more than the other." It also campaigned to raise the legal age of consent, which in Illinois was ten for a girl. Laws raising the age of consent went hand-in-hand with reforming evidentiary rules and burden of proof standards, as statutory rape made questions of consent and a girl's character and past sexual conduct moot. As the PAWC understood, such reformed laws removed a judge's discretion and further controlled defense attorneys' behavior.

Significantly, the PAWC did not conceptualize its legal work as distinct from its other work, which included providing nonlegal advice, giving financial aid, locating lodgings, finding employment, and seeking medical services for its clients. It would have made little sense to the women of the PAWC to believe that the purpose of legal aid was simply to provide their clients the ability to go to court separated from a concern with substantive justice or material well-being. Moreover, they claimed, the PAWC provided its clients with “self-respect” and “self-dependence.”

The women of the PAWC also tended to accept the stories told by those women seeking their help. In other words, they presumptively believed their clients rather than finding their stories suspect. Moreover, they appreciated the importance of allowing clients to tell their stories slowly, which they asserted “busy lawyers would not bear.” As they recognized, many women who sought help did not have legally cognizable claims. But they believed that client narratives had value in and of themselves. “Many a tale of woe is told in our office, the mere listening to which by sympathetic and intelligent women is all the help possible. It is astonishing how grateful some of these women are for the opportunity of telling their trials to such lis-



teners.” For a poor woman to tell her story to a middle-class or wealthy woman and to have her listen to and acknowledge her story must have given the poor women a sense of empowerment and agency.

Like attorneys, volunteers and employees of the PAWC treated all conversations with clients as confidential, often refusing to write or speak about individual cases. As Holt wrote, “Much of our work is of a confidential nature, and as our aim has always been to encourage women to come to us for advice and counsel, it has been one of the essential stimulants to them to be assured of the strictly private nature of all work that could be kept private.” Thus the Agency never publicly discussed its cases in any detail, even in its fund-

Photo of Lucy Louisa Flower, longtime officer of the PAWC, Chicago Markers of Distinction, <http://chicagotribute.org/Markers/Flower.htm>.

raising materials. By contrast with a variety of reform organizations, especially those related to women, the PAWC eschewed melodramatic narratives of seduction and betrayal of young women. In their view, such stories and issues were so serious that they needed to stand outside popular discourse. They were not to be traded upon and instead were to be treated as precious.

Early in its history, the PAWC's members correctly understood their power as coming from their class and social position. As time passed, they began to base their claims to expertise and authority on their growing legal knowledge and experience. They proudly proclaimed that the bench and the bar recognized and appreciated their expertise. The PAWCs relationship to judges and attorneys was complicated, because they simultaneously looked down on many lawyers and judges while still longing for their acceptance and basking in their compliments. When longtime officer and board member Mary Potter Crane died, the PAWC boasted that "she had a judicial mind, and was always welcome at the State's Attorney's office, and her advice and counsel in difficult cases . . . were frequently sought by attorneys." Likewise, one board member wrote that Charlotte Holt "has so won the respect and confidence of the courts that whatever case she presents

is sure of respectful hearing." The PAWC was also particularly proud when, in the late 1890s, they received requests from judges to have the PAWC station a representative in every police court to handle cases involving women, an affirmation of the PAWC's importance and its members' legal and practical expertise.

The work of the PAWC had lasting influence not only in shaping the idea and practice of providing organized legal aid to the poor, but also in building Chicago's specialized courts, including its juvenile and domestic relations courts. A number of women who were officers of the PAWC played significant roles in the creation of these courts and the PAWC may have functioned as a model for such courts. Both of these courts were intended to move away from an adversary model of law and sought to minimize the role of lawyers. Likewise, tremendous discretion was vested in social workers, often women, whose job was to understand holistically those who appeared before the court. They were to use such knowledge to fashion individual solutions, and such courts were intended to be flexible institutions not bound by strict understandings of the rule of law.

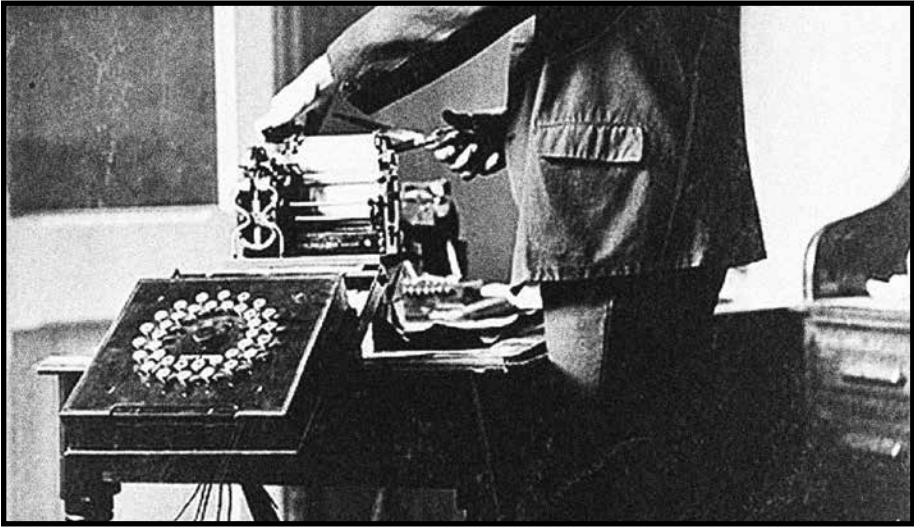
The PAWC was an extraordinary institution. At a time when only a miniscule number of women were lawyers, it created a space in which women provided legal advice to

other women. Situated within a thick network of women's clubs, the PAWC expanded its activities to provide a wide range of legal services to women, and it refused to make hard distinctions either between the types of cases that it would handle or between legal versus nonlegal cases. In 1905, the PAWC became the Chicago Legal Aid Society and its vision of legal aid as part of a continuum of care became the hallmark of a Chicago-style of legal aid, which is still with us today. ♦

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Felice Batlan earned her J.D. from Harvard and spent a decade working in New York in the financial services industry. She then earned her Ph.D. in history from NYU. She specializes in both the regulation of financial markets and in nineteenth and twentieth century U.S. legal history with a focus on women and gender. She has published widely in law reviews, history journals, and anthologies. This is an excerpt from her forthcoming book *Inventing Legal Aid: Lawyers, Social Workers, and the Poor, 1863–1960*.



"Telegraph operator printing telegram," photo by Waldon Fawcett, c. 1908, National Photo Company Collection, Library of Congress.

WHAT'S A TELEGRAM?

Henry H. Perritt, Jr.

When Chicago-Kent's predecessors were founded in 1888, there were no e-commerce, wireless access to media, e-mail, Facebook friends, or airline delays. That does not mean, however, that people did not shop remotely, enjoy entertainment, communicate with friends, or travel. They just did them in other ways, all of which sometimes spawned disputes, some of which found their way into the courts. What follows is a story of the dreams of 125 years ago. The characters are fictional. What they talk about is not.

* * *

Annie Morton, 22, had just finished playing "Now Where Did You Get That Hat?" on the piano in the parlor of the rooming house at 2210 South Prairie Street in Chicago.

"I should like to have one just the same as that!"

"Where'er I go, they shout 'Hello! Where did you get that hat?'" she sang.

Patrick Boland, still dressed in his telegraph messenger's blue uniform with red trim, sat on the couch by the piano and applauded. His cap with a prominent brass number "79" sat on the table beside him.

Annie giggled and then looked at Luther Wardell, who was sitting in a plush chair beside the couch. "What's the matter, Luther?" she asked. "You don't like it? It's one of the most popular songs this year."

"Oh, I'm sorry!" Luther said. He plucked at his blue denim trousers. "I enjoyed it. I was just thinking while I listened."

"About the strike?" Patrick asked.

"Yeah. I think I'm just going to go home and help work the farm. I didn't think they'd fire *all* of us. Who knew that they'd be able to get hundreds of strike breakers to work as switchmen and brakemen within a week."

"That's the CB&Q Railroad for you," Patrick said. "They're even nastier to their passengers than to the brakemen. They're tough."

"Everyone is tough," Luther responded. "I'm sick of it. You come to Chicago to make your fortune, and everyone holds you down. There are no decent jobs."

"Sure there are," Patrick said. "I've got one, with American District Telegraph Company. When I started, at age twelve, the pay was \$17 per month. Now, I'm one of about one hundred boys employed, most in the LaSalle Street central office, but I'm up to \$20."

"Oh, we know, we know," Luther said. "Seven long years you've been telling us your boring stories about it."

"It's not boring at all. It's exciting," Patrick said, glancing at his cap proudly and determined to gain the upper hand against Luther. "We're allowed to take on special errands for our customers. One guy who owns the livery stable up by the river paid me two dollars to follow his wife and report to him that she had spent a good part of her day with one of the stable boys." He was disappointed by Annie's lack of reaction.

"I've heard that Western Union pays better," Annie said. "They have about 140 boys, about half of them working out of the main office at LaSalle and Washington Streets." Annie liked to tease Patrick almost as much as she liked playing music.

"It's not so bad," Patrick said. He liked for Annie to think well of him. "We wait on benches at the office and get called in turn, according to when we went out last. Almost everyone rides a safety bicycle now. When a customer rings his call box, we ride out and pick up a handwritten message and bring it back for transmission."

"What's a safety bicycle?" Luther asked.

"You are a farm boy," Patrick laughed. "You ought to get one. They've been

out for three years. They're much better than the old kind with a large front wheel and a smaller rear one. These new ones have pneumatic tires."

"I can't afford one now," Luther said glumly.

"I don't like it that we have to pay for our own uniforms," Patrick admitted. "They cost \$12, and they take it out of our pay."

"I bet you have to buy your own bicycle, too," Luther said. "That's not for me. I've got loans to pay back now."

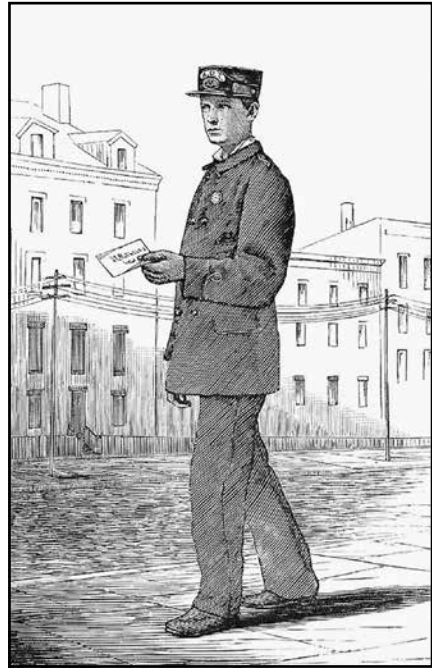
"You had to borrow money only because you lived so high during the strike. You should have saved up beforehand," Annie said.

She shifted her attention back to Patrick. "You're a thing of the past," Annie said. "What do people need with telegraph boys when they can just use the telephone?"

"Don't be ridiculous," Patrick said. "Telephones will never replace the telegraph. Everyone knows that. Did you see the article in the January 1, 1888, *Chicago Daily Tribune*?"

"No."

"It was headlined, 'Telephones a Nuisance.' It quoted the Reedy Elevator



Manufacturing Company as saying, 'The service we receive is not at all satisfactory, and if all instruments could be removed we would have ours fired at once. Would much prefer the old system of messengers, letters, or dispatches, as frequent costly errors are made by telephone, which you cannot trace to any reliable party. We don't think the telephone company has sufficient assistance in their offices to wait on calls promptly. Frequently we ring three or four times before we hear the lazy "hello?" and more frequently they reply, "Busy now—call again," or "Busy; will ring you up when through." But they never ring. We consider it very poor service. But as our neighbors and customers have the phone we must keep up with the procession.'"

"Frank, the Telegraph Boy," illustration (uncredited) from *The Telegraph Boy* by Horatio Alger, Jr., 1879.

"That's not fair," Annie said. "I work very hard. So does everyone else."

"We're all getting screwed," Luther said. "And now, that robber baron, Benjamin Harrison, stole the election from Grover Cleveland."

"He's not a robber baron," Annie said. "I wouldn't think you would favor Cleveland. He vetoed pensions for veterans. He's not for the common man. And he's a sympathizer for the South. He would have never supported the women's suffrage movement. We're poised to get something done, now, on the amendment. The two main organizations merged last year."

"Women's suffrage—pshaw!" Luther said. "Next thing they'll want is to shut down the saloons."

"It would help you save money for a bicycle, if they were shut down," Annie said. "Anyway, I'm going to do my part. I'm going to become a lawyer."

"A lawyer!" Patrick said. "You can't be a lawyer."

"Yes, I can. Did you see the story in the September 7, 1888, edition of the *Chicago Daily Tribune*? Miss Emma Baumann and Miss Ada Dalter applied for admission to the Chicago Evening Law School. Several of the seventy young men already enrolled objected and went to Judge Moran, one of the founders, who rebuked

them and said that the precedent was well established that women could be admitted to the bar. I'm going to apply."

"Even if they let you in," Patrick said, "and even if you get admitted to the bar, no one will give a girl lawyer any work."

"I hope you won't borrow any money for that," Luther said, laughing. "You'd be better off borrowing it to go to saloons."

"I've already got a promise of some work," Annie said. "One of the mechanics at the telephone company wants me to help him get a patent for his idea for a new switchboard apparatus. It's a good idea. The days of making a telephone call by signaling a switchboard operator and giving her the name of the person to be called are over. They have just introduced five-digit numbers to accommodate the rapid growth in subscribers. Now automatic dialing is being introduced in Chicago—"

"Because of the rude and lazy operators," Luther said.

"What does this guy look like?" Patrick asked.

"Jealous?" Annie teased.

"Well, you ought to think about it," Patrick said. "You're on the verge of becoming an old maid."

"And all the inventiveness is already producing lots of lawsuits—more work for lawyers," Annie argued. "Alexander Graham Bell and Western Union are suing each other. Morse's patent for the telegraph is always being challenged."

"Keep your job, but organize," Luther said. "Launch a strike against all this mechanical foolishness, taking away jobs. It was bad enough on the railroad."

"Oh, right," Annie said. "It's a wonder you still have all your fingers. They need to make the Janney automatic coupler mandatory."

"I guess I don't have to worry about that anymore," Luther said, flexing the fingers on both hands and looking at them. "That's another thing a union could do for us. The most basic goal, though, is to insist on what the Congress just did for mail carriers: making eight hours a full day of work, with overtime pay for hours worked over eight."

"That'll never happen," Patrick declared. "And they shouldn't have done it for the post office workers. They don't work as hard as we do, and we damn sure don't have a deal like that."

"They deliver mail twice a day to residential customers and four times a day to businesses," Luther said.

"It would be quicker if they rode bicycles, like we do," Patrick said.

"Just wait," Annie said. "Bicycles aren't the future. Self-propelled carriages are. The Wisconsin legislature just awarded a prize for a steam-propelled carriage that completed a race from Green Bay to Madison, a distance of 201 miles at an average speed of six miles per hour."

"That was nine years ago," Luther said. "And nothing has come of it. There'll be flying machines before horses and railroads need to be afraid."

"Better try to get a union for the horses," Annie said. "There will be flying machines. Four years ago, a man named John Joseph Montgomery made a glider flight near San Diego."

"Yeah, but you can't put a steam engine in a glider," Patrick said. He laughed. "If they could, Luther, you can make sure they hook them together with automatic couplers. A flying train!"

"I'm telling you," Annie said. "People are inventing things all over the place. Pretty soon, I won't have to learn the new songs to play them on the piano. Thomas Edison just got a patent for a machine that plays music from grooves etched on a wax cylinder."



Photo of telephone operators sitting at a switchboard, 1903, DN-0001438, Chicago Daily News negatives collection, Chicago History Museum.

“Well, I guess they can stop work on the Auditorium Theatre,” Patrick said, “even though it’s scheduled to open next year. President Harrison and Vice President Levi Morton are supposed to come to the grand opening. They’ll be disappointed to hear that all the operas and plays are going to have to find somewhere else to perform in Chicago. Oh—I forgot—there won’t be any operas and plays. They’ll be a thing of the past. Everyone will stay at home, sit on the couch and listen to ‘phonographs.’ They’ll all get fat, and no one will learn how to play the piano anymore.”

Annie ignored him. “And he just applied for another one: an ‘Optical Phonograph,’ capable of showing pictures in full motion. Already, people are excited about the Kodak,

the first roll-film camera just patented. And a man named Herman Hollerith received a patent for an automatic tabulating machine. You punch numbers into paper cards and his machine sorts them.”

“You must have gotten into your mother’s laudanum,” Patrick said. “Next thing you’ll predict is sending telegraph signals through the air, without wires.”

“It’s possible,” Annie said. “An English scientist, James Clark Maxwell, has already proven mathematically that electricity can be transferred through free space, and a German, Heinrich Hertz, has demonstrated it in his laboratory.”

“Things *are* changing pretty fast,” Luther said, showing a spark of enthusiasm for the first time. “There

sure is a lot of stuff being invented on the railroads,” Luther said. “The Janney automatic coupler is one; airbrakes before that. Now, people are working on automatic signaling systems and even on ways to replace the steam locomotive with some kind of engine that burns fuel inside the cylinders. I’ve been coming up with some ideas of my own before I got caught up in the strike.” A hint of sadness returned to his face. “One thing I’ll miss is all the machinery.”

He thought for a moment and then rushed on: “Think about what Old Man Sears and his partner, Roebuck, have already done. Their new ‘Sears & Roebuck’ catalog was just published from their new office on Homan Street. It advertises watches and jewelry, which can be purchased by mail. ‘Book of Bargains: A Money Saver for Everyone,’ ‘Cheapest Supply House on Earth,’ and ‘Our trade reaches around the World,’ he brags. People are ordering them like crazy. There’s no reason they can’t include other stuff, like sewing machines, sporting goods, musical instruments, saddles, firearms, buggies, bicycles, baby carriages, eyeglasses, clothing . . . ” He looked at Patrick. “Or safety bicycles,” he said.

“She must have given you some of the laudanum,” Patrick said. “Steam powered gliders linked with automatic couplers, card sorting machines linked with vapor telegraph signals. Just imagine!” Patrick chuck-

led. “For that matter, you could order from the catalog with a vapor telegram. Old Man Sears would track the orders by sorting the cards, and deliver the stuff by steam-powered gliders and steam carriages.”

“I tell you what, Luther,” Annie said. “Don’t go back to the farm. Stay here, with us. I’ll become a lawyer and help you get patents on all the stuff you’ll invent—if you keep all your fingers. Go talk to Reverend Frank Wakeley Gunsaulus, the minister at Plymouth Congregational Church. He’s already trying to persuade Philip Armour to extend his grant for the Sunday School that Julia Beveridge is running to establish a new kind of school where students of all backgrounds can prepare for meaningful roles in a changing industrial society, to study mechanics, chemistry, architecture, and library science. They already have something like that in Boston. It’s named the Massachusetts Institute of Technology—‘Boston Tech,’ most people call it.”

Luther looked at her.

“We’d make a good team,” she urged, with a quick glance at Patrick.

“Who knows?” Luther added. “Maybe we’ll get married.” He leered at Patrick.

“Maybe,” Annie said, “Even though Patrick is cuter in that uniform. Put on the hat, handsome.”


“Ha!” Luther said. “I can just see it. He’ll still be riding his safety bicycle around the streets of Chicago asking people if they want to send a telegram, and they’ll say, ‘What’s a telegram?’”

Annie laughed. Patrick tried to smile, the hat halfway to his head.

“And then,” Luther said, looking at the hat and laughing harder. “They’ll say, ‘now where did you get that hat?’” ♦

Henry H. Perritt, Jr., has been a law professor for 32 years and served as Dean of Chicago-Kent from 1997 to 2002. He has worked on the White House staff and was the Democratic candidate for the U.S. House of Representatives in the Tenth District of Illinois in 2002. He has written 15 books; 80 law review articles; four plays, including a musical; and five novels. He is a sailor and a helicopter pilot.

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Advertisement for the Kodak camera, c. 1890.

PRIVACY AND TECHNOLOGY: A 125-YEAR REVIEW

Lori Andrews

The year the Chicago-Kent College of Law was founded, a new consumer product arrived on the scene: the portable camera. Before then, taking someone's photo was a big deal. A person would get dressed up and go to a studio. Photos were not taken without a person's permission. But the portable camera changed all that—and in the process led to the development of legal rights of privacy that endure today.

An 1890 newspaper article warned:

Have you seen the Kodak fiend?
Well, he has seen you. He caught

your expression yesterday while you were innocently talking at the Post Office. He has taken you at a disadvantage and transfixed your uncouth position and passed it on to be laughed at by friend and foe alike. His click is heard on every hand. He is merciless and omnipresent and has as little conscience and respect for proprieties as the veriest hoodlum. What with Kodak fiends and phonographs and electric search lights, modern inventive genius is certainly doing its level best to lay us all out bare to the gaze of our fellow-men.

Like Facebook, Twitter, Instagram,

Snapchat and YouTube today, the portable camera fundamentally changed the way other people and institutions could peer into people's lives. But the issues raised by today's cutting-edge technologies are similar to those raised by the Kodak fiend.

In the late 1800s, a lawyer, Samuel Warren, married the daughter of a Senator. He was unprepared for the incessant media attention to their union, fueled by the newly developed portable camera. After his children were born, paparazzi would snap photos of the babies when the family took walks down the street. Annoyed, he thought about what legal recourse he might have. Were there any legal precedents for a "right to be let alone"? He pondered the issue with a friend from law school, Louis Brandeis. They could have suggested that people no longer had a right to be left alone because technologies could now track and record what they did. Instead they noted that the intrusiveness of technologies like the portable camera made it even more important for people to have control over information about themselves. "The intensity and complexity of life attendant upon advancing civilization has rendered necessary some retreat from the world," they wrote, "so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasion upon his privacy, subjected him to mental pain

and distress, far greater than could be inflicted by mere bodily injury."

Their article, "The Right to Privacy," was published in 1890 in the *Harvard Law Review*. They demonstrated that a privacy right had a basis in fundamental constitutional values, such as the right to refuse to testify against oneself, and common law principles, such as the "right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."

"The protection afforded to thoughts, sentiments, and emotions . . . is merely an instance of the enforcement of the most general right of the individual to be let alone," they said. "It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed."

Their ideas were incorporated into law through the creation of four distinct legal actions for invasion of privacy: for intruding on someone's seclusion, for publicly disclosing private information, for putting a person in a "false light" in the public eye, and for appropriating someone's name or likeness for commercial use. They advocated that information about and photos of people could be disseminated if they had consented or if the matter was of legitimate public interest. Since then, the fundamental constitutional right to privacy has additionally been in-

terpreted to include a right to make important personal decisions, such as whether to use contraception or whether to homeschool your child.

The mode of analysis of the two Boston lawyers from a century ago has been used to analyze each new technology that has reached the courts. How does it affect the indi-

ultimately, privacy prevailed.

When Charles Katz entered a public phone booth in 1965, he never imagined that cops would tap the phone line. The cops charged him with placing illegal bets—and he protested that they had infringed the Fourth Amendment limits on governmental intrusion into a person's

The Kodak Fiend.

Have you seen the Kodak fiend! Well, he has seen you. He caught your expression yesterday while you were innocently talking at the Post Office. He has taken you at a disadvantage and transfixed your uncouth position and passed it on to be laughed at by friend and foe alike. His click is heard on every hand. He is merciless and omnipresent and has as little conscience and respect for proprieties as the veriest hoodlum. What with Kodak fiends and phonographs and electric search lights, modern inventive genius is certainly doing its level best to lay us all out bare to the gaze of our fellow-men. The moral of it all is: keep cool, stand erect, and wear a kindly face. You will be a better man, and live longer, and make



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vidual and society? How do fundamental legal values help to protect the individual when the technology is used? As each new technology has been adopted—including forensic technologies, medical technologies, and computer technologies—the application of fundamental values has been used to protect, and often expand, people's privacy rights. Sometimes courts, lacking the comprehensive analysis of technology like the one undertaken by Warren and Brandeis, took missteps when they first encountered a technology. But

private life. The trial judge said that wiretapping didn't violate the Fourth Amendment because the Founding Fathers drafted the constitutional provision to honor people's privacy in their homes. In this case, the police hadn't trespassed into his home. In fact, there had even been a Supreme Court decision on the matter, back in 1928, when cops had used earlier wiretap technology to learn that someone was violating Prohibition.

In that earlier case, *Olmstead v. United States*, 277 U.S. 438 (1928), the five-justice majority of the U.S. Supreme Court had held that a

"The Kodak Fiend," Hawaiian Gazette, December 9, 1890, Chronicling America Collection, Library of Congress.

bootlegger's privacy hadn't been invaded and he hadn't been forced to incriminate himself because, although police had recorded the calls he was making from his home, the wiretap equipment had been placed on phone lines outside his home. Writing for the dissent was none other than Louis Brandeis, who was then a Supreme Court justice. He argued that fundamental values had to be applied to new technologies. He noted that when the Constitution was adopted, "force and violence"—torture and breaking into people's houses—were the only ways that the government had to obtain private information about people. The Constitution protected against force and violence. But, said Brandeis, "discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet. . . . The progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home." According to Brandeis, the Constitution's fundamental value of privacy and the right not to incriminate yourself needed to be applied not only to "what has been, but of what may be."

Forty years after the *Olmstead* decision, when Charles Katz's case was appealed to the U.S. Supreme Court, the majority of the justices applied Brandeis's logic. Even though Charles Katz was using a public phone booth, the Court said that the constitutional right of privacy "protects people, not places." What a person seeks to preserve as private, even in a public place, may be constitutionally protected.

The Supreme Court protected Katz's privacy by enunciating a legal test that is still used today: Did the person have an "expectation of privacy" and was that an expectation that society was willing to protect? As a result, police need to get a warrant, based on probable cause, before they tap someone's phone.

The march of law enforcement technology continued, and in 2001, a new forensic technology reached the court. A federal agent suspected Danny Kyllo of growing marijuana. Since growing pot indoors requires high-intensity lamps, the agent sat in a car across from the home and used an Agema Thermovision 210 thermal imager to scan Kyllo's home. The scan showed that the roof over the garage and a side wall of the home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex. The agent concluded that Kyllo was growing pot and convinced a judge to allow him to search Kyllo's home. The agent found

pot, and Kyllo was convicted on a drug charge. Because the thermal scanner did not physically intrude on the house and did not show any private human activities, the trial court said that it hadn't infringed Kyllo's constitutional rights.

The appellate court, too, held that Kyllo had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home, and "even if he had, there was no objectively reasonable expectation of privacy because the imager 'did not expose any intimate details of Kyllo's life,' only 'amorphous "hot spots" on the roof and exterior wall.'"

When the U.S. Supreme Court took the case, it reversed Kyllo's conviction. "It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology," wrote Justice Antonin Scalia. "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."

In 2012, the U.S. Supreme Court in *United States v. Jones*, 132 S. Ct. 945 (2012), assessed the use of a GPS tracking device installed on a car driven by Antoine Jones, a D.C. nightclub owner. Jones was the tar-

get of a narcotics investigation by police and the FBI. The Court held 9 to 0 that the twenty-eight-day warrantless use of the GPS violated the Fourth Amendment. In her concurrence, Justice Sotomayor pointed out how the fundamental right to privacy was salient even in today's world. "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations," wrote Sotomayor, adding, "People disclose the phone numbers they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries and medication they purchase to online retailers. . . . I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year." Justice Sotomayor also was concerned that "[a]wareness that the government may be watching chills associational and expressive freedoms."

Contemporary medical technologies, such as genetic testing, have also raised disputes about the reach of privacy principles. When genetic testing became possible, people were tested without their knowledge or consent. Doctors and researchers would use blood that people had

given to labs for routine cholesterol or pregnancy tests and perform additional testing, without the person's consent, for everything from breast cancer to Alzheimer's disease. The argument was, what's the harm? The person had already been pricked; the additional tests involved no additional intervention. And even if the blood was collected anew—as in a forensic DNA test—blood tests were safe and noninvasive.

But then employers and insurers started discriminating against healthy people based on their genetic predisposition to future disease. With certain genetic mutations, for example, some women had a higher risk of developing breast cancer than other women. Even with those mutations, half the women would not develop breast cancer. Some women didn't want to know whether they had the mutations or not. They said they would feel like they had a time bomb ticking away inside them. But employers and insurers wanted that information to make their decisions. There were no legal limits on what could be done with that information.

During routine physicals, an employer in California asked the company doctor to surreptitiously test the female employees to see if they were pregnant and the African-American employees to see if they carried the sickle cell anemia gene mutation. The results were not disclosed to the employees, but they were put in to their personnel files.

When the existence of the files leaked, the employees sued. The trial court dismissed the case, saying that the test was a modest intrusion, no more than what people usually undergo in a physical. But the appellate court held that genes contain personal information that is protected by the fundamental right to privacy. "One can think of few subject areas more personal and more likely to implicate privacy interests than that of one's . . . genetic make-up," wrote the Court of Appeals for the Ninth Circuit in *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1269 (9th Cir. 1998). Since then, Congress has passed a law, the Genetic Information Nondiscrimination Act, specifically prohibiting employers and insurers from discriminating against people based on the results of genetic tests. People's privacy rights include the right not to have genetic information generated about them or used against them.

Even computer technologies that collect data about people have been subject to a fundamental rights analysis. When Judge Robert Bork was nominated for the U.S. Supreme Court in 1987, Michael Dolan, a Washington, D.C., newspaper reporter, attempted to discredit him by publishing his video store rental records. In today's world, Judge Bork's choices seem tame: British movies, Bond movies, costume dramas. The reporter was disappointed not to see legal movies such as *12*

Angry Men or *To Kill a Mockingbird*. Instead, Judge Bork had rented “only one truly court-related tape”: *The Star Chamber*.

Bork was denied confirmation by the Senate. But the publication of his video rentals did get the attention of Congress. “It is nobody’s business what Oliver North or Robert Bork or Griffin Bell or Pat Leahy watch on television or read or think about when they get home,” said Senator Pat Leahy. “In an era of interactive television cables, the growth of computer checking and check-out counters, of security systems and telephones, all lodged together in computers, it would be relatively easy at some point to give a profile of a person and tell what they buy in a store, what kind of food they like, what sort of television programs they watch, who are some of the people they telephone. . . . I think that is wrong. I think that really is Big Brother, and I think it is something that we have to guard against.”

Senator Paul Simon agreed. “There is no denying that the computer age has revolutionized our world. Over the past twenty years we have seen remarkable changes in the way each one of us goes about our lives. Our children learn through computers. We bank by machine. We watch movies in our living rooms. These technological innovations are exciting and as a nation we should be proud of the accomplishments we have made. Yet, as we continue

to move ahead, we must protect time honored values that are so central to this society, particularly our right to privacy. The advent of the computer means not only that we can be more efficient than ever before, but that we have the ability to be more intrusive than ever before. Every day Americans are forced to provide businesses and others personal information without having any control over where that information goes. . . . These records are a window into our loves, likes, and dislikes.”

The legislators applied the fundamental constitutional right to privacy and passed a law in 1988 forbidding disclosure of people’s video rental records (or, in this day and age, what they watch on Netflix). The bill prohibits video stores from disclosing “personally identifiable information”—information that links the customer or patron to particular materials or services. In the event of an unauthorized disclosure, an individual may bring a civil action for damages.

The concerns raised by the disclosure of Bork’s video records are mild when compared to today’s digital invasion of privacy. A billion people have joined Facebook, a population only slightly smaller than either of the two largest countries, India and China. Marketing companies, political candidates, law enforcement agencies, employers, and other social institutions peer through the keyholes of people’s lives by as-



Chicago-Kent College of Law Facebook page, retrieved Feb. 5, 2013, from <https://www.facebook.com>.

sessing the information and photos that individuals post and that third parties post about them. Even more troubling, data aggregators use surreptitious tracking mechanisms to follow people across the web and use that information to make judgments about them. If a woman does a Google search for old guitars and then seeks a credit card, she will be offered a credit card with less advantageous terms—not because her credit is bad, but because garage rock bands in general are less likely to pay off their credit cards. If she has a photo of herself with a wineglass in her hand, she may be denied a job. Seventy-five percent of employers look at people's social network presence; one-third reject people who have alcohol in a Facebook photo. And, as with past technologies, courts and legislatures have been slow to protect privacy, initially holding that privacy rights are lost “on affirmative

keystroke.”

In just the past two years, however, courts and lawmakers have begun to protect freedom of expression and privacy on social networks. In *Layshock v. Hermitage School District*, 650 F.3d 205 (3d. Cir. 2011), and *J.S. v. Blue Mountain School District*, 650 F.3d 915 (3d. Cir. 2011), the Third Circuit Court of Appeals held that public high school students had a First Amendment right that covered their posts on social networks even if those posts were critical of school administrators. And a few state legislatures—including that of Illinois—passed laws prohibiting employers from asking for the social network passwords of an employee or a job applicant. That Illinois law went into effect 125 years after Chicago-Kent College of Law opened its doors. The Illinois governor came to the campus to sign the bill into law and was introduced by a Chicago-

Kent student who was working on internet privacy issues.

The Warren and Brandeis article not only created a legal framework that still applies today to safeguard people's privacy, it also established a method for judging new technologies. The authors analyzed how fundamental values inherent in the U.S. Constitution and common law provide a basis to make judgments about new technologies. They also assessed how new technologies affected individuals, institutions, and the larger society. Warren and Brandeis did not suggest that individuals adapt to each new technology, but instead advocated that society assure that each technology was employed in a way that was consistent with fundamental societal values.

When Brandeis was appointed to the U.S. Supreme Court 26 years after his privacy article appeared, he continued to champion the application of constitutional values to modern technologies. He also wrote about the nature of a Constitution. "Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of Constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can

approach it.' The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a Constitution, therefore, our contemplation cannot be only of what has been but of what may be."

When the law school opened its doors 125 years ago, it would have been difficult to imagine the high-tech world of today. But by learning about cutting-edge technologies as well as fundamental legal principles, the students at IIT Chicago-Kent College of Law have been well educated, in every era, to face their generation's legal challenges. ♦

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Photo of John Montgomery Ward, 1922, Bain Collection, Library of Congress.

JOHN MONTGOMERY WARD: THE LAWYER WHO TOOK ON BASEBALL

Christopher W. Schmidt

As 1888 drew to a close, John Montgomery Ward stood atop the world of professional baseball. The star shortstop had just led the New York Giants to the National League pennant, followed by a triumph over the St. Louis Browns of the rival American Association in what even then went by the inflated title of baseball's "World Series." A dominating pitcher early in his career (he threw the second perfect game in major league history), an arm injury forced Ward to recreate himself as an infielder, where he became one of the best fielders and hitters of his era. He was lauded in the press as a ballplayer

with "few equals and no superiors," and "by long odds the most popular player in the profession." These accomplishments would eventually earn Ward a place in the Baseball Hall of Fame.

Ward's skills on the ball field were only a part of what made him such a remarkable figure. Contemporaries and historians alike have struggled to describe him. One adjective-happy biographer took the saturation approach: he was a "jug-eared, willowy, peach-fuzzed, overreaching punk" as well as "honorable, smart, and tenacious." More admired than liked seems to have been the consensus view of Ward contemporaries. In a

profession not known for intellectualism, he stood out. Although Ward left school at the age of thirteen in order to pursue his baseball career, he eventually earned, in his spare time, degrees in political science and law from Columbia. He was said to speak five languages. A regular contributor to newspapers and periodicals, in 1888 he published *Baseball: How to Become a Player*, which he described as a “handbook of the game, a picture of the play as seen by a player.”

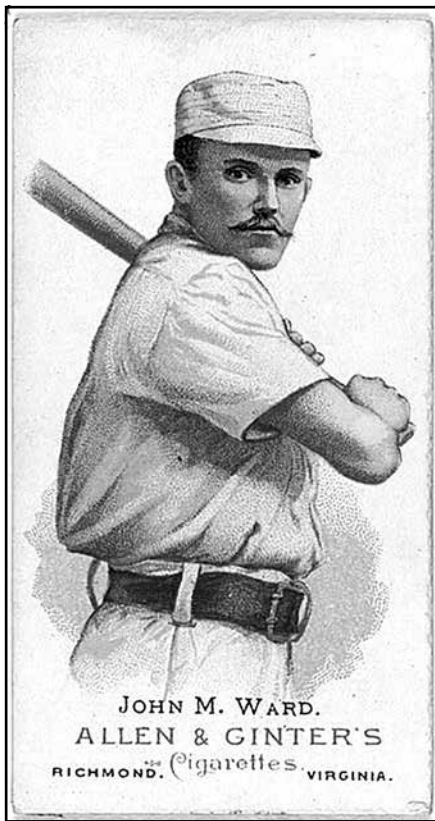
Ward was also a pioneering labor leader. In 1885, he established America's first sports union, the Brotherhood of Professional Base Ball Players. Initially designed to help sick, injured, or hard-up ballplayers and promote professional standards, the Brotherhood quickly evolved into something approaching a craft union for ballplayers. Ward had forward-looking attitudes on race as well. At a time when the color line was hardening in American society, and organized baseball had become a whites-only affair, Ward urged the Giants to sign an African-American pitcher.

If all this wasn't enough, Ward's social life was also noteworthy. In 1887 he married a New York actress and socialite, Helen Dauvray, who also happened to be a passionate baseball fan. “Her tiny hands beat each other rapturously at every victory of the Giants and her dark eyes were bedewed at every defeat,” re-

ported the *New York Times*. “But the thousands of spectators who observed Miss Dauvray's emotions little suspected that one of the Giants had any precedence over the others so far as her affections were concerned.” She had donated the Tiffany trophy that went to the World Series champion; it was the “Dauvray Cup” that her husband brought home at the end of the 1888 season. In *How to Become a Player*, the ever gallant Ward included a chapter explaining the basics of the game “for the benefit of those ladies whose escorts either cannot, or will not, answer their questions.” He also offered advice for his gentleman readers: “Whoever has not experienced the pleasure of taking a young lady to her first game of ball should seize the first opportunity to do so.”

Life was not all three-hit games and celebrity life for the great Monte Ward, however. His relationship with Helen Dauvray was strained almost from the start. He was carrying on an affair, and she knew it; she wanted to return to the stage, and he didn't want her to. They lived together for only a year and soon divorced.

His baseball career too was about to veer off in some unexpected directions. Following his World Series triumph, Ward captained a team of National League all-stars that traveled around the globe between October 1888 and April 1889 in an effort to promote the game overseas. It was a grand gesture, fitting for an emerg-



ing era of American nationalism and confidence on the international scene. But the world tour also helped set in motion one of the most significant upheavals in baseball's history. The man who organized and led the tour around the globe was Albert Goodwill Spalding. Soon after they returned home, he and Ward would face off in an epic struggle for the future of the game.

Spalding, a star pitcher in his younger years, now owned the Chicago White Stockings of the Na-

tional League in addition to a burgeoning sporting goods empire. The game never had a more effective and more passionate salesman. Baseball, he once wrote, captured the nation because "it is the exponent of American Courage, Confidence, Combativeness; American Dash, Discipline, Determination; American Energy, Eagerness, Enthusiasm; American Pluck, Persistency, Performance; American Spirit, Sagacity, Success; American Vim, Vigor, Virility." (Spalding also basically created baseball's all-American birth myth, which conveniently featured a future Civil War hero, Abner Doubleday, in 1839 dreaming up the game in bucolic Cooperstown, New York. In fact, baseball had largely evolved from various children's games; if it ever had a proper birth moment, it was among young professionals in 1840s New York City.) Spalding envisioned the world tour as an opportunity to sell two things he loved above all: the game of baseball and the equipment that bore his name. Despite his background as a player, and despite his overwrought romanticism about the national pastime, Spalding approached his role as a team owner from the perspective of the captain of industry that he had become: the players were employees, and comfortably paid ones at that; and it was the owner's job to control costs and ensure a compliant workforce. Needless to say, he didn't think much of Ward's efforts with the Brotherhood.

John M. Ward, New York Giants baseball card portrait, 1887, Library of Congress. Facing: Photo of Albert Goodwill Spalding, 1910, Bain Collection, Library of Congress.

The world tour had just reached Cairo, Egypt, in February 1889 when the players received news that, at their winter meetings in New York, the National League owners had adopted a major reform designed to reign in player salaries. They created a player classification system under which “Class A” players earned \$2,500, “Class B” players \$2,250, and so on, down to “Class E” players who earned \$1,500. The classifications scheme took into account not only player ability, but also “conduct, both on and off the field.”

Ward, who had already established himself as his generation’s most outspoken critic of baseball’s distinctive labor practices, saw the plan as an affront to the players. What made working as a professional ballplayer different from any other occupation was the “reserve clause,” a provision in player contracts under which an owner could “reserve” a number of players when the term of their contracts ended. The clause prohibited the player from negotiating with another team unless his team released him. As professional baseball was controlled by an agreement between the teams under which each team agreed to respect the player contracts of other teams, the reserved player faced three options: sign a new contract at the terms dictated by the owner; hold out and hope for better terms; or stop playing baseball. Owners defended the reserve clause as es-



sential to ensuring the stability of the game. It did indeed further this goal. But there was another reason, one they didn’t trumpet so proudly: it kept down player salaries. And here too it was effective. In the late 1880s, as club profits tripled, player salaries grew by only 30 percent, a fact at least partly attributable to the reserve system.

In 1887, Ward had a scathing attack on the reserve clause, titled “Is the Base-Ball Player a Chattel?” He compared the reserve clause to “a fugitive-slave law”: it “denies [the player] a harbor or a livelihood, and carries him back, bound and shackled, to the club from which he attempted to escape.” The remedy, according to Ward, was simple: get rid of “base-ball law” and allow “the business of base-ball to be made to rest on the ordinary business basis.”

When he learned of the owners' classification plan, Ward was so incensed he threatened to abandon the world tour to come home and confront the owners. (The news that the Giants were trying to trade him only added to his frustration.) He suspected that Spalding had planned the entire trip just to get him and some of his allies out of the country in order to go forward with their plans. If this was indeed Spalding's plan (and there is no evidence it was), it backfired, as the tour ended up giving some of the game's top players long hours to share their grievances. The plan for the baseball revolution that would upend the game in 1890 might very well have been hatched in quiet conversation among the players while on Spalding's world tour. Nearly all the players on the tour would join Ward's revolt against the National League.

During the 1889 season, Ward began preparations for the creation of a rival major league, the Players League. Working in secret (he was, after all, still on the enemy's payroll), he found financial backing and convinced many of his fellow players to commit to the new league. Some aspects of the Players League looked familiar. The players were familiar—the new league lured many of the best National League players to its rosters. And the cities in which they played were familiar—the seven cities in which their eight teams played were all cities that already

had National League teams. But the business model behind the Players League was radically different from anything that had come before. Each club was run by an eight-man board, consisting of four players and four investors. The league was governed by a senate-like organization, with two representatives from each team (one elected by players, one by owners). Players had three-year contracts, and no reserve clause. Investors were promised the first \$10,000 of each club's net profit, with the rest to be divided among the players.

Spalding and the National League attacked the Players League. First, they turned to the courts: the Giants sued Ward for breach of contract. Ward had violated the terms of his reserve clause, they claimed, and they asked a New York state court to issue an injunction prohibiting Ward from playing for anyone else. The court denied the injunction. As the reserve clause failed to specify such essentials as Ward's salary and the terms of the renewed contract, the judge concluded that it was too indefinite to be treated as a binding contract for the 1890 season. The court also raised the disturbing question of whether, assuming the reserve clause were read to constitute a binding contract for the following season, the renewed contract would also include a reserve clause. If so, the player would be tied to his current team for as long as the team desired, while the team could release

a player with only 10 days' notice. This was rather absurd, according to the judge. "We have the spectacle presented of a contract which binds one party for a series of years and the other party for 10 days, and of the party who is itself bound for ten days coming into a court of equity to enforce its claims against the party bound for years." The judge concluded that the reserve clause was unenforceable for "want of fairness and of mutuality."

With the courts refusing to help, Spalding turned to public opinion. He pulled out all the rhetorical stops. What the players were doing was "secession," a "revolt," a "war"; the National League was confronting "hot headed anarchists" who were leading a "revolutionary movement."

But the fall of the Players League after just one season came not from Spalding's attacks in the press, nor from legal challenges. It came from the marketplace. The new league had the best players, but this was not enough. With three major leagues competing for a limited fan base, everyone suffered at the gate. At season's end, when Spalding opened negotiations with Players League investors, he pointedly excluded Ward and any other players. "[T]he monied men met with the monied men," as Spalding put it. The National League owners simply bought out their competition; several Players League clubs were integrated into a reconfigured National League. Ward's rev-

olution was over.

Ward returned to the National League, where he played four more seasons. He was still one of the best players in the league when he retired in 1894. He went on to be a successful lawyer, a gentleman farmer, and a top amateur golfer. Although he mended fences with organized baseball, his passion for the cause he had led never left him. In 1925, shortly before his death, he gave a speech—at an event to celebrate the National League, of all places—recounting the events of 1888–1890 in which he made clear that the war against the National League, while doomed, was justified.

For a brief moment, the Players League presented a radical alternative business model for professional sports, one in which the players and owners shared control of the game as well as its profits. With the failure of Ward's baseball revolution, the owner-dominated system lived on. In the following decades, various teams would go to court to have the reserve clause enforced against players who had jumped their contracts (a relatively common occurrence any time there was a rival league that refused to abide by the agreement that controlled the baseball monopoly). Judges, with only the rarest of exceptions, sided with the players, often citing Ward's case as authority on the matter. The reserve clause lived on, however, and it did so be-

cause the baseball monopoly, while periodically challenged, remained in place. As long as owners respected the contracts of their on-the-field competitors, they did not need the courts. For this reason, the most significant legal challenges to baseball's unique labor practices came in the realm of antitrust, not contract law. But baseball law survived this challenge too, as the United States Supreme Court granted, and then twice reaffirmed, that federal antitrust law did not apply to professional baseball.

When change eventually came in the 1970s, it was at the hands of another organized players movement, but this time it was achieved not through a rival league but through labor negotiations (with a critical assist from a sympathetic arbiter). Today, major league baseball operates in a way that has some similarities to the core premise of the alternative model Ward had offered. The game is governed, in large part, through collective bargaining agreements between players and owners. With the skyrocketing of player salaries after

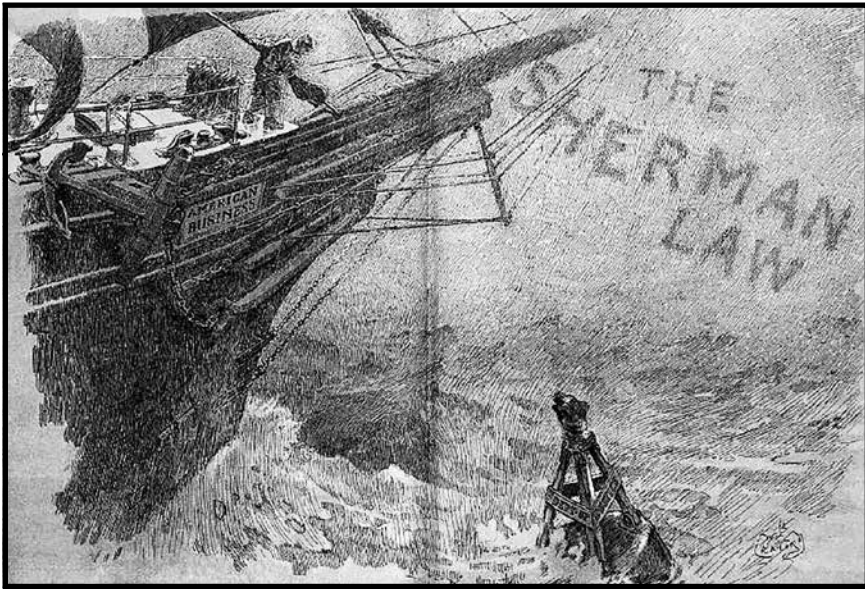
the fall of the reserve clause, the game's profits are far more evenly distributed between players and owners. It took almost a century, but John Montgomery Ward's vision for major league baseball has, in some part, been realized. ♦

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"The fog." Puck cartoon by Will Crawford, 1911, Library of Congress.

U.S. ANTITRUST: FROM SHOT IN THE DARK TO GLOBAL LEADERSHIP

David J. Gerber

When the United States Congress enacted the first "antitrust" law in 1890, it was taking a shot in the dark. At the time, there was no concept of "antitrust law"—i.e., a general legal regime intended to combat restraints on competition. Today more than 100 countries have such laws, including all significant participants in the global economy. Competition law has become a major factor in economic life throughout much of the world. U.S. antitrust law has played a central role in this remarkable evolution, and it is generally acknowledged to be the most important of

these laws. It is the touchstone and frame of reference for international discussions, and it is often used as a model or at least a major source of guidance by other countries in developing their own competition laws. The story is extraordinary, interwoven with the roles of power and ideas and intertwined with the evolution of the U.S. and its role in the world. This brief essay sketches its trajectory. Chicago-Kent's role as an educational institution tracks that trajectory.

I. A Shot in the Dark

This new type of legislation was a “shot in the dark” in the sense that few, if any, of the legislators had any way of knowing what consequences the legislation would have. They were “shooting” at something, but they didn’t know what they might actually hit. So what were they trying to do and why?

Antitrust law was, above all, a response to social turbulence and tensions. The United States in the 1880s presented a complex mixture of hope, fear and resentments. The terrible Civil War was a memory, but not a distant one. Rapid industrialization was creating great wealth for a few and jobs for many. Immigration was bringing millions from Europe to take those jobs and to find land to farm in the Midwest and the West. Yet the rapid changes also generated sectional conflicts and social tensions, and political and legal institutions strained to respond effectively to them.

This mixture of pressures, conflicts and resentments led Congress to enact what came to be known as antitrust law. One key background factor was the resentment that many felt towards the new super rich and their lavish and ostentatious lifestyles. Located primarily in New York and other cities on the East Coast, these groups had achieved great wealth quickly, often through control of large manufacturing busi-

nesses. These firms often dominated specific industries, and this dominance allowed them to exclude new entrants from those industries. It also allowed them to extract what many viewed as unfair prices and conditions on their suppliers as well as their employees. This led to anger at the power of these so-called “trusts” and often combined with anger at the power of their owners to control the destinies and stifle the possibilities of others, especially those in other parts of the country. A specific catalyst for antitrust law was rising anger among Midwestern farming communities at what they saw as rapacious and monopolistic conduct by railroad companies and others who they believed were manipulating prices paid to farmers for their grain and livestock. Groups representing these interests pressured their representatives in Congress to do something about the “trusts” that were amassing fortunes for a few, but exploiting vast numbers of hardworking farmers and tradesmen.

Congress responded to this pressure by enacting the Sherman Antitrust Act in 1890. The name that soon attached to the legislation—“anti-trust”—reflected its goals. It was a tool to be used to combat the monopolistic abuses of very large enterprises. There was, however, no model for Congress to use in doing what it wanted to do—or wanted to appear to be doing. So Congress

“punted”—it simply federalized two barely used legal principles. It took two concepts from the common law that had been used for quite different purposes, first in England and then to a limited extent in the U.S., and it made them enforceable under federal law. The statute was very short, and its basics have not changed since 1890. The first concept was “restraint of trade.” This concept had been used primarily in civil cases to combat overly restrictive provisions in contracts. The second basic idea was “monopolization.” It had also been part of the English common law, but for centuries it had been little used in either England or the U.S. The legislation contained virtually no guidance as to the substantive content of the provisions, leaving issues of content to the federal courts.

The Sherman Act transformed the role of these private law concepts by providing that the federal government could enforce them. Congress appears to have given little thought to how this was to take place. It did not create specific procedure for the enforcement of the antitrust provisions. It merely authorized the U.S. Justice Department to file claims in the regular courts, using the normal rules for civil proceedings. Given that the federal government was still very small in 1890, the legislators could hardly have envisioned extensive federal administrative application of the provisions. Some assumed that private actions could be brought on

the basis of the legislation, and this was confirmed a few years later.

This was the “shot in the dark”! The U.S. Congress was responding to specific domestic pressures. The legislators just took common law concepts and gave the federal government authority to use them in the federal courts. The legislators paid little, if any, attention to how others in the world had dealt with similar issues or what, if anything, they might think about the U.S. experiment. They just experimented, basically relying on judges to sort out the issues and develop the law.

II. An Antitrust System Develops

Prior to the Second World War, the system evolved slowly and fitfully according to a pragmatic, court-based process—typical of U.S. legal development generally. The judges were solving the conflicts before them, and there is little evidence that they thought about their decisions as creating a “system” of antitrust law. They relied on accumulated practical experience, domestic conceptions of the judicial role, and often on ideologies about the role of markets as they shaped the content and roles of antitrust in the U.S. There were relatively few cases, and other than in a few large companies there was relatively little interest in this area of the law.

After the war, the roles and importance of antitrust law expanded

greatly. One factor was transnational. Antitrust came to be seen in the U.S. as a part of a global "mission" to provide an antidote to fascism and to support freedom. Many believed that the concentrations of economic power in Germany and Japan were at least in part responsible for the horrors of the Second World War, and they saw antitrust as a means of preventing such concentrations or at least curbing the resulting abuses. This led U.S. government officials and others actively to promote antitrust in Europe. A European version of antitrust law had begun to develop in the 1920s, but it had not gained much status in most European countries, and thus U.S. antitrust became a symbol of restructuring in Europe, both in individual countries and in connection with the process of European integration. At the same time, the economic and political dominance of the U.S. in the so-called "free world" allowed the U.S. to apply its antitrust law to conduct outside its own territory and thus further support the antitrust mission.

This heightened political, symbolic and economic importance of antitrust on the international plane combined with the *de facto* protection of the U.S. market encouraged rapid growth in the perceived importance of antitrust within the U.S. and the expansion of antitrust principles. By the early 1970s, antitrust had become a very important part of the le-

gal environment of business, and as such it attracted strong interest from lawyers. The growing importance of antitrust meant that law schools increased their offerings in the area. According to Ralph Brill, antitrust was first taught at Chicago-Kent College of Law in 1973. This also meant, however, that antitrust represented a major cost for many U.S. businesses. These costs were tolerated as long as economic factors (especially currency and regulatory obstacles) buffered U.S. firms from international competition.

In the 1970s, the international economic picture changed markedly, and these changes in global economic conditions generated a fundamental change in U.S. antitrust law. The "oil shocks" of the early 1970s and the concomitant international currency restructuring led to increased awareness in the U.S. business community of the need for U.S. businesses to compete internationally. Antitrust now began to appear as a burden on the U.S. economy, and this led scholars to examine ever more carefully the intellectual justification for such burdens. Economists and law professors increasingly argued that the courts had expanded antitrust law too far and that the entire edifice of antitrust law should be viewed from the perspective of its economic impact. This perspective quickly won favor in the courts and law faculties, and within a few years it led to a radical revision of standards for antitrust law in the U.S. The central substantive

law questions were now to be judged by economists according to economic criteria.

III. Global Competition Law Leadership

The “shot in the dark” that was the U.S. antitrust law system is today no longer solely a domestic field of law. It is now also a critically important component of global economic policy! The system that U.S. judges had evolved to deal with purely domestic problems and that relied on little more than confidence in the capacity of courts to develop reasonable responses to conflicts has been transformed into the central player in efforts to respond effectively to economic and other forms of globalization. It is now a U.S. export product, and the stakes are enormous. What directions and forms will the rules of competition take? Treatment of these issues will be a factor in the future of many countries, including the U.S., and for more than two decades Chicago-Kent has brought transnational competition law to our students, and Chicago-Kent faculty have contributed to the international discussion of these issues.

A. Foreign Interactions and Perceptions

U.S. antitrust now plays on a global stage, and much will depend

on how foreign experts, lawyers, government officials and business leaders see U.S. antitrust. They will make decisions about what to do in their own countries and on the international level. This means that their perspectives on the U.S. system are critical to its roles both at home and abroad, and foreign images of U.S. antitrust have changed radically. Prior to the Second World War, those in Europe who knew anything about U.S. antitrust law (and they were few) generally considered it a mistake. They tended to see it as a failure that actually created more harm than good by forcing companies to merge rather than cooperate. This view predominated in large measure until after the Second World War. The Europeans were developing a different concept of competition law that emphasized administrative control of dominant firms. This conception of competition was spreading rapidly in Europe in the 1920s, but depression and war led to its virtual abandonment.

After that war ended, however, U.S. antitrust law became associated with U.S. economic dominance in the “free world.” The real and imagined connections between economic concentration and military expansion in both Germany and Japan convinced many that U.S.-style antitrust law should be used to combat such concentrations. U.S. occupation forces in Germany and Japan imposed U.S. antitrust ideas during

CONTROL OF THE MARKET

A

LEGAL SOLUTION of the TRUST PROBLEM

BY

BRUCE WYMAN, A.M., LL.B.

PROFESSOR OF LAW IN HARVARD UNIVERSITY AND
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Title page of Control of the Market, by Bruce Wyman, 1911, Library of Congress.

the occupation period, and the U.S. insisted that both countries either enact or maintain competition law after the occupation. This increased awareness of these ideas abroad. Perhaps more important, however, was the perception that antitrust was a source of strength for the U.S. economy and thus a potential spur to growth that other countries could employ.

U.S.-style antitrust did not, however, always fit well with European legal traditions and institutions, and in most European countries skepticism toward the U.S. model limited progress in protecting competition. In Germany, however, a separate set of ideas about how to protect competition developed in the 1930s and 1940s in the underground, and after the war it became the basis for German antitrust law. From here it spread to the European level and became part of the process of European integration. The basic idea of

U.S. antitrust law—i.e., protecting the competitive process from restraints—was part of this model of competition law, but the model itself was conceptually and institutionally quite distinct. European scholars and officials in these areas often looked to U.S. antitrust for comparisons and insights into problems, but there was relatively little interaction between U.S. and European forms of competition law until the 1990s.

In the 1990s, these relationships became far closer and more important for both the U.S. and Europeans. Moreover, the fall of the Soviet Union precipitated widespread interest in market-based approaches around the world and revived the messianic tenor of the U.S. antitrust law community. Many countries that had socialist or other command-based approaches to the organization of economic activity now introduced antitrust laws or significantly increased their investment in

the enforcement of such laws. Often they looked to U.S. antitrust officials, lawyers and scholars for help in implementing or evaluating their new activities.

B. Policy Issues and Obstacles

This has raised a critically important issue: How will/should competition law on global markets be implemented? Globalization has shown the limitations and distortions of the traditional jurisdictional system—e.g., differing rules and procedures for different parts of the same economic market. Many in the U.S. and elsewhere believe that the best response to these problems is to encourage all countries to follow at least the basic substantive law approach of the U.S. antitrust law system. This would generate convergence among competition law systems around the world and reduce the harms caused by current jurisdictional arrangements. Many others are, however, skeptical that the U.S. model should be the focus of convergence. They often see some form of coordination (perhaps at the World Trade Organization level) as the best response.

How these foreign decision makers and decision shapers understand and evaluate U.S. antitrust law is critical to this set of decisions. It is important, therefore, that they understand as clearly as possible how U.S. antitrust law works and what the guiding ideas are behind the law.

Only then will they be in a position adequately to evaluate it, compare it with their own systems, and make informed choices in relation to it. There are many obstacles—linguistic, comparative, political and economic—to achieving an adequate understanding of the U.S. system and of the implications of various policy choices for the global system and for individual components of it. Moreover, it is critical that U.S. lawyers, officials and scholars acquire a better understanding of the competition law elsewhere and thus of the potential bases for convergence and coordination on the global level.

IV. Concluding Comments

A former U.S. antitrust official not long ago wrote that U.S. antitrust is (or could be) the “light of the world.” That might be a bit strong, but U.S. antitrust certainly does play a key role in the development of the global economy and its many components. Now the big question is whether U.S. legal thinking and the creative and pragmatic impulses that have been so much a part of U.S. antitrust law will continue to provide the leadership that can make the most of these opportunities.

These changes have important implications for U.S. legal education. At Chicago-Kent College of Law, we are doing our part. Here, and at some other leading law schools, these issues have generated increas-

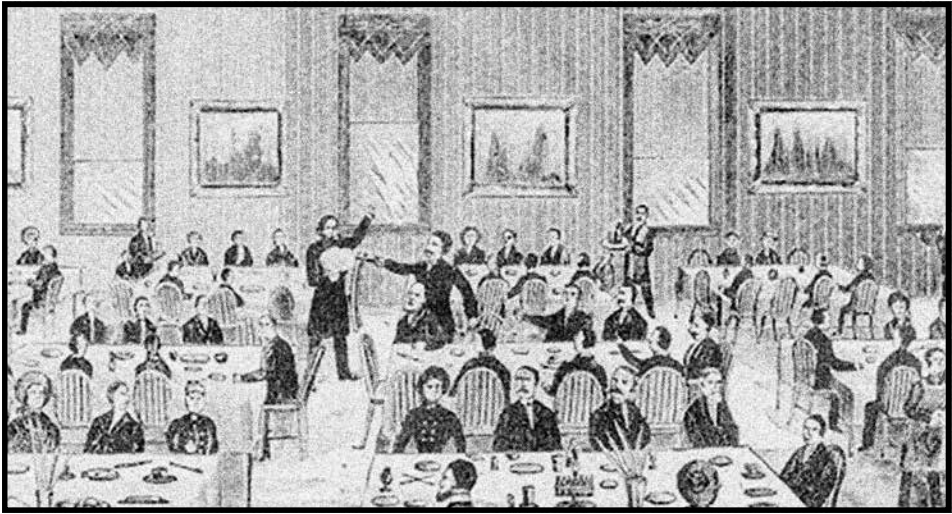
ing attention. Since the 1980s, and even more so since the early 1990s, I and others have included transnational issues in the domestic antitrust course and included an antitrust focus in courses such as international business transactions. I have also long offered a seminar in international and comparative antitrust law that tackles these issues directly. These efforts have two central objectives. One is to educate U.S. lawyers to perform more effectively in this new global context. The other is to educate foreign lawyers about U.S. antitrust law and provide them with tools for understanding and evaluating it and its global roles.

One fact stands out in 2013 at the celebration of Chicago-Kent's 125 years of teaching law. The U.S. will have to earn its leading role in antitrust law on the global level. Effective legal education in this area will be a key element in whether it will be successful in achieving that goal. ♦

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Illustration, from *The Life of David S. Terry*, by A. E. Wagstaff, 1892, Internet Archive, <http://www.archive.org/details/lifeofdavidsterr00wags>, p. 410.

THE LEGACY OF *IN RE NEAGLE*

Harold J. Krent

For generations, commentators have decried the fact that we live in an era of an imperial presidency. The second President Bush famously (or infamously) ignored Congress in subjecting suspected terrorists around the world to military commissions at Guantánamo Bay and citizens and suspected terrorists alike to warrantless surveillance of their phone calls. President Barack Obama, like his predecessor, has used executive power to shape rules and regulations that Congress had delegated to subordinates in agencies as opposed to the President directly. Both Presidents claimed broad power to circumvent the Senate's power to consent to treaties and

appointments. Congress and the courts have fought back to limit the scope of presidential power, at least in discrete contexts.

Somewhat lost in history, a comparable battle over executive power brewed one hundred and twenty-five years ago, culminating in the U.S. Supreme Court's 1890 decision in *In re Neagle*, 135 U.S. 1 (1890). The case questioned the President's inherent authority to assign a U.S. Marshal to protect the life of Stephen Field, a sitting United States Supreme Court Justice. Marshal Neagle confronted the potential assailant, David Terry, and killed him when he thought Justice Field's life was in danger. California authorities were none too

pleased given that Terry had been so prominent in California political life and that Terry likely was unarmed. Local officials indicted and then imprisoned Neagle for killing the Californian.

Events leading up to the Supreme Court decision read like a soap opera, perhaps revealing more about the interplay of society and politics than does the decision itself. The history of the case starts with David Terry, who before the Civil War served on California's Supreme Court with Justice Stephen Field. Terry gained notoriety by challenging Senator Broderick from California, a former friend who was also a friend of Field's, to a duel, which left Broderick dead. The dispute centered over political rivalries, in part due to Terry's sympathy with the Confederacy. Terry was acquitted and then left California to support the South in the Civil War. After the war, Terry returned to law practice and politics in California and, of relevance here, within twenty years fell within the orbit of an apparently glamorous but unstable woman named Sarah Althea Hill.

In the late 1870s, Hill became the companion of Senator William Sharon of Nevada, who had amassed great sums from real estate and mining investments. Sharon, who was much older than Hill, evidently sundered relations when he suspected Hill's designs on his money. Hill continued to plot how to separate

Sharon from some of his enormous wealth. She made a demand on Sharon for alimony, asserting that Sharon had married her some three years earlier when they had started their "companionship." In so doing, she presented what likely were forged documents attesting to the marriage relationship. Sharon sued in federal court in California (due to diversity of citizenship) in 1883 for a declaration that no marriage had ever taken place. Hill then filed her own suit in state court in 1884 to demonstrate that the marriage was valid and requested a share of Sharon's property. She hired Terry as one of her attorneys.

The state court bizarrely decided the case in Hill's favor even though the judge labeled Hill a liar. Sharon immediately appealed to the California Supreme Court but died before the case was heard. His executor pursued the appeal.

In the meantime, the federal suit proceeded slowly, prompting more aberrant behavior from Hill. She sported a pistol at many of the proceedings, and waved it at witnesses. She threatened to have adverse witnesses and their counsel killed. Although Justice Field, by then serving on the U.S. Supreme Court, was not assigned to preside over the case, he was assigned as a Justice riding on circuit to hear several motions arising out of the case. During one proceeding, Justice Field in an effort to maintain decorum ordered that

Ms. Hill be disarmed, and he found her in contempt of court. At the end of the proceedings in 1886, the federal court determined that the marriage was a sham and the documents forged.

Terry then married Hill, manifesting an intriguing view of the attorney-client relationship. More importantly, the marriage placed pressure on his successors on the California Supreme Court to uphold the state court finding that Hill had been married to Sharon. A divided California Supreme Court acquiesced, affirming the trial court's decision that a valid marriage had indeed taken place.

In a complicated procedural move, the estate then moved to revive the federal court decree and enjoin both Hill and Terry from maintaining the validity of the prior marriage, despite the state court ruling. At this point, the case was assigned to U.S. Supreme Court Justice Stephen Field, sitting by designation. Field in 1888 determined that Hill had obtained the marriage documents through fraud. As he orally delivered the decision, Hill caused a commotion in the courtroom protesting the ruling and had to be escorted out. Terry in a display of chivalry thereupon attacked the marshal for carrying out Field's order. Field ordered both Terry, his former associate on the California Supreme Court, and Hill imprisoned for contempt of court. Hill threatened Field's life,

and Terry claimed that Field's decision had been bought with Sharon's money. Terry then sought a pardon from President Grover Cleveland, asserting in part that Field was retaliating against him for refusing to throw his support to Field in a prior presidential primary. Cleveland declined, and Terry served out his short term.

Upon release, Terry apparently became even more consumed by revenge, broadcasting widely his intent to harm Justice Field. When Justice Field traveled back west from Washington, newspapers speculated on when the confrontation would occur. Accordingly, President Benjamin Harrison through his Attorney General assigned Marshal Neagle to protect Justice Field.

The confrontation arose in the summer of 1889 when Field traveled by train from San Francisco to Los Angeles. Terry and his wife boarded the train at a stop along the way and entered a dining room in which Justice Field was eating breakfast. Hill left the room—presumably to gather her pistol from her chamber—but her husband did not wait and circled behind Justice Field and delivered two blows to his head. Neagle, the marshal, announced his presence and called on Terry to stop. Terry made a move as if to draw a knife that he customarily carried, and Neagle responded with two shots from his pistol, killing the assailant.



Illustration, San Francisco Examiner, 1888, shows Terry attacking a marshal for removing Mrs. Terry from the courtroom, U.S. Marshals website, <http://www.justice.gov/marshals>.

A local constable arrested Neagle on the spot. Ms. Terry, upon her return to San Francisco, swore out a complaint for murder against both Field and Neagle. California authorities then arrested Field, who was released under a bond. An eastern newspaper reported the following imaginary dialogue:

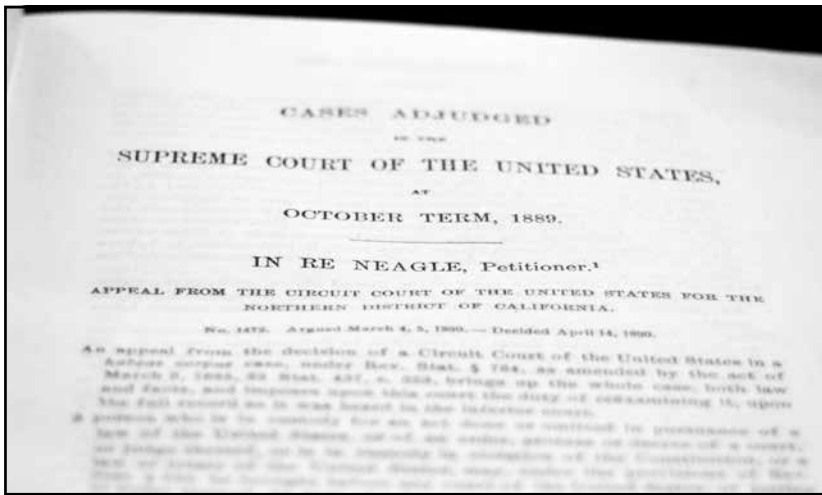
Newsboy: "Man tried to kill a judge in California!"

Customer: "What was done about it?"

Newsboy: "Oh! They arrested the judge."

Field immediately filed for a writ of habeas corpus, and the federal court within a matter of days granted Justice Field's writ, ending Justice Field's stay at the other end of the courtroom.

Marshal Neagle was not as fortunate—he unquestionably fired the shots that killed Terry. He filed a similar writ of habeas corpus from a California prison, asserting that he acted within the line of duty in protecting Justice Field's life. He was moved to San Francisco, but remained behind bars. He argued that, to the extent his actions were undertaken pursuant to federal authority, his conduct could only be challenged in federal court. The federal court eventually scheduled a hearing, and upheld the writ, reasoning in part that "upon general, immutable principles, the power must be necessarily inherent in the executive department of any government worthy of the name of government, to protect itself in all matters to which its authority extends; and this necessarily involves



Supreme Court decision in In re Neagle, 135 U.S. 1 (1890), photo by Emily Barney.

the power to protect all the agency and instrumentalities necessary to accomplish the objects and purposes of government.” The Supreme Court accepted the case for review at California’s request.

On one level, *In re Neagle* reflects the generation-old conflict inherent in our system of federalism. Some Californians were resentful that the federal courts did not respect the state courts’ determination that a valid marriage had been entered into between Hill and Sharon. Moreover, authorities in California were more than willing to imprison and indict a U.S. Marshal, even when the Marshal was following presidential orders. Others in California believed that California courts should be trusted to determine whether Neagle’s defense was valid without interference from the federal courts. Whatever one thinks of the resurgent importance of federalism in our

generation—including petitions for secession filed in the wake of President Obama’s 2012 victory—few proponents today would be so bold as to approve of California’s imprisonment of a U.S. Marshal who unquestionably was acting pursuant to the President’s orders, not to mention local authorities’ decision to arrest Justice Field himself. The story reminds us that, no matter how intense regional divides may be today, they pale before the tensions between states and the federal government over a century ago.

But, the facts underlying the case reveal more—a sordid tale of love gone awry, reminiscent of politicians’ struggles more recently, from Senator Gary Hart’s famed ride on the aptly named boat “Monkey Business” to President Bill Clinton’s fling with an intern, and from Wilbur Mills’ dalliance with the Argentinian stripper Fanne Foxe to Representa-

tive Anthony Weiner's more recent debacle of sexting. Politicians' affairs impact not only political races, but Supreme Court decisions as well. *Clinton v. Jones*, 520 U.S. 681 (1997), was not the first Supreme Court case on presidential power sparked by politicians' sexual misconduct.

The doctrinal legacy of *In re Neagle* endures. A divided U.S. Supreme Court, with Justice Field recusing himself, held that the President enjoys a residuum of authority under Article II of the Constitution to take steps to protect the nation even if those steps are not spelled out by Congress. In presaging presidential power debates of the last decade, the Court concluded that the President could rely on powers not directly rooted in the text of the Constitution in safeguarding the country. The Court explained, "In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument" is appropriate, including the duty to protect a Supreme Court Justice, even in the absence of explicit congressional authorization. The Court continued that "it would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their

duties, from the malice and hatred of those upon whom their judgments may operate unfavorably." Presidents can "infer" powers from the Constitution—including the duty to protect Justices from harm. In the case, those nonstatutory or "inferrible" powers displaced California's authority to try Neagle for murder and provided Neagle a complete defense to the charge. Although the accumulation of powers and responsibilities over the last 125 years has radically transformed the presidency, the debate over the scope of presidential powers under Article II is not new. There is a residuum of authority under Article II—even if the extent remains in bitter dispute—permitting presidents leeway to ensure protection of the government and the nation itself. ♦

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"First woman jury, Los Angeles," photo by Bain News Service, 1911, Bain Collection, Library of Congress.

THE CHANGING COMPOSITION OF THE AMERICAN JURY

Nancy S. Marder

When Chicago-Kent College of Law was founded 125 years ago, many of our key legal institutions, such as the jury, were well established. By 1888, the year of our school's founding, the jury was seen as an institution that provided justice in a nation created by a revolution of "we the people." Although it no longer seems remarkable to us today, the jury system gave ordinary citizens, untutored in the law, the power to decide cases and to dispense justice.

Today, reinforced by movies, television shows, and constant media coverage, the American people have two deeply-held views about

the jury. The first is that the jury is meant to represent all of us—"we the people"—by reflecting our diversity as much as is practical. In every high-profile jury case, much attention is paid to the diversity of the jury. In particular, we care about race and gender more than almost any other characteristics. Although the diversity of the venire is enshrined in several Supreme Court cases, the diversity of the petit jury is reinforced by the portrayal of the jury in popular culture.

The second widely-held view is that the jury has one job, and that is to determine the facts. Although a jury trial is presided over by a judge

and involves decision-making about the law, the jury ostensibly plays no role in determining which laws apply or what standards should be met. This arrangement seems sensible because the judge and lawyers bring to the trial legal expertise that the jurors do not have.

While these two views are well accepted, the students in our first law class in 1888 would be shocked to learn what our first-year students now take for granted. Though our modern impulse is to assume that a jury should reflect the diversity of our community, at one time that diversity was limited to white men of property. Our broader understanding of diversity has been the result of a hard-fought struggle to extend the rights of jury service to African-American men and later to women. This expansion of jury rights, however, has not been continuous; rather, it has proceeded in fits and starts. In fact, African-American men in some states in the South were given the right to serve as jurors during Reconstruction only to have that right stripped away by the end of the 1800s before being restored decades later. So, too, with women in the Western territories; they had the right to serve as jurors in the late 1800s, but it was short-lived.

It will also surprise the modern reader to discover that the role of the jury was initially to decide *both* the law and the facts. The diminution of the role of the jury, so that it de-

cided only the facts, happened gradually from about 1850 to the 1930s. Some researchers believe that as the practice of law became more professional, the distinction widened between judges and lawyers who knew the law and ordinary citizens who did not, until it made little sense for jurors to decide the law.

I offer a more radical theory in which I see a connection between the growing diversity of the jury and the declining power of the jury. My theory is that the white, male legal establishment began to curtail the power of the jury as African-American men and women had the right to serve on juries. Although African-American men and women lost that right by the late 1800s, they regained it, albeit after much struggle, many decades later. For both groups, however, even when official barriers were eliminated, other practices kept them from actually being seated on juries. Some of these practices, such as the peremptory challenge, are still used today in a discriminatory manner, in spite of Supreme Court cases to the contrary, in an effort to keep African-American men and women from being seated on juries.

The Exclusion of African-American Men from the Jury

Albert Alschuler and Andrew Deiss, in an article entitled *A Brief History of the Criminal Jury in the United States*, identified 1860 as

the year in which African-American men first served on a jury. In that year, two African-American men sat on a jury in Worcester, Massachusetts. In 1864, Congress passed legislation that allowed African-American men to testify in federal courts, and this was followed by legislation that allowed them to testify in state courts. Jury service was soon to follow.

During Reconstruction (1863–1877), African-American men served on juries in some states. For example, in South Carolina in 1869, the legislature mandated not only the integration of grand and petit juries, but also that the racial composition of the jury should approximate that of the community. Similarly, in New Orleans between 1872 and 1878, one-third of the citizens summoned for jury duty were African-Americans, and this percentage matched their representation in Orleans Parish. Between 1870 and 1884 in Washington County, Texas, where African-Americans were approximately 50 percent of the population, they constituted about 30 percent of those who served on juries. During the 1870s, in Warren County, Mississippi, African-Americans were about 35 percent of the grand jurors, and even though that percentage did not approximate their percentage in the community (where they were 70 percent of the community), it was a significant improvement over their total exclusion in the past.

Newspapers, in their reporting of jury trials during this period, noted when an African-American man (and they were only men) served as a juror. On January 15, 1884, in the *Chicago Daily Tribune*, one story questioned whether South Carolina jurors in a particular case had voted to convict based on their political parties; it included the following observation: “Three of the jurors, one a negro and two white men, refused to find a verdict of guilty.” On February 16, 1885, in the *Chicago Daily Tribune*, a story described a murder trial in New Orleans and mentioned the sole African-American juror on this jury: “The only juror who stood out from the very beginning in favor of conviction was one Edwards, a negro, and the only negro on the jury, and he maintained his manly and honest position to the end, notwithstanding that [the defendant’s] friends went to his house while he was serving and threatened his family with violence.”

The newspaper accounts also noted when the African-American juror was the first African-American to serve in that locale. A brief story on May 6, 1891, in the *New York Times* announced that a man named Nelson Stark, described as “colored,” had been selected as the eleventh juror in the Garrison murder trial. The story noted that “[it] is the first time in the history of that county [in West Virginia] that a colored man has sat on an important

NEGROES AS JURORS.

TWO COLORED MEN SERVING ON A GRAND JURY AT LOUISVILLE.

LOUISVILLE, Ky., Nov. 2.—A great deal of comment has been caused to-day by the presence of two colored men on the Grand Jury impaneled in the Circuit Court. It is the first

"Negroes as Jurors," New York Times headline, Nov. 3, 1885.

case in the State court." Similarly, on September 7, 1880, the *Chicago Daily Tribune* noted that "[f]or the first time in the history of Kentucky the panel of jurymen for the duty in a criminal court included in the list of the Louisville Circuit Court to-day three colored men." Two of those men were selected to serve on a grand jury and the third man was selected for a petit jury. The article noted that there were a number of African-Americans at court that day and "they evidently took great satisfaction in seeing representatives of their race assume privileges heretofore denied them."

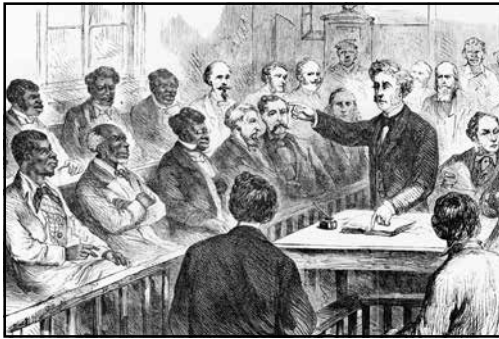
The inclusion of African-American men on the jury was not limited to Southern states. A notice in the *New York Times* on November 19, 1890, announced that "[a]mong the jurors in a case in the Circuit Court this morning was Abe Peterson, a Grafton blacksmith, who is the first colored man to sit on a jury in Rensselaer County[, New York]." On July 9, 1893, a lengthy story in the *Chicago Daily Tribune* reported that for the first time in Madison, Wiscon-

sin, an all-African-American jury (six jurors) heard a civil case involving an assault and battery; the article noted that this jury marked "an inauguration of a new judicial era."

Newspaper accounts of jury trials also reported on perceived differences between white jurors and African-American jurors. According to one story in the *Chicago Daily Tribune* on July 10, 1880, "[t]he first negro juror in Atlanta, the other day, promptly joined in convicting a negro who was put on trial." As a result of African-Americans' seeming proclivity to convict, "[t]he next prisoner, also a negro, objected to having one of his own race on the jury." Another story, published in the *New York Times* on November 3, 1885, also observed that African-American jurors had been "decidedly in favor of the Commonwealth as against colored offenders." The article suggested that African-American jurors wanted to show that they were committed to law and order—so much so that older lawyers who had African-American clients would not select African-American jurors be-

cause “they claim[ed] that colored jurors are more severe in meting out punishment to offenders of their race.”

In spite of constitutional protections provided by the Fourteenth Amendment (1868) and the Fifteenth Amendment (1870), statutory protections provided by the Ku Klux Klan Act of 1871, the Federal Civil Rights Act of 1875, and the Federal Jury Selection Act of 1879, and a U.S. Supreme Court case, *Strauder v. West Virginia*, 100 U.S. 303 (1880), which held that a state statute dis-



qualifying African-American men from jury service was unconstitutional, African-American men lost their place on juries in the South in the 1890s. Booker T. Washington observed at the end of the nineteenth century: “In the whole of Georgia & Alabama, and other Southern states not a negro juror is allowed to sit in the jury box in state courts.” According to a 1910 study, African-Americans rarely served on juries in Florida, Louisiana, Mississippi, Missouri, South Carolina, and Virginia, and they never served on juries in Alabama and Georgia. In sum, according to another commen-

tator, Douglas Colbert, “[a]lthough it was common for blacks to have served as jurors during Reconstruction, they virtually disappeared from the southern jury box by 1900, even in counties where they constituted an overwhelming majority of the local population.”

Even though statutes could no longer prohibit African-American men from serving on the jury after *Strauder*, other practices kept them

from the jury box. James Forman, in *Juries and Race in the Nineteenth Century*, described the violence directed toward Afri-

can-Americans and white Republicans that kept African-American men in the South from serving as jurors or witnesses, or seeking or being afforded the protection of the legal system. All-white Southern juries failed to convict the white perpetrators of these crimes.

Nonviolent and more subtle practices also kept African-Americans from actually being seated on a jury, even if they had been summoned to serve. These practices ranged from color-coding by race the names placed in the wheel from which jurors were selected to the discretion exercised by white jury commissioners in selecting only

“Jury of Whites and Blacks,” illustration by James E. Taylor, 1867, Library of Congress.

white men whom they knew to serve as jurors. Mississippi's 1892 law, which allowed three state officials to select jurors based on their "good intelligence, sound judgment, and fair character," was another way to keep African-Americans off the jury; other Southern states followed suit.

The practice of discriminatory peremptory challenges, which continues to this day, was another way to keep African-Americans from being selected for petit juries. Each party could exercise a certain number of peremptories and use them to remove prospective jurors without giving any reason at all. Parties used their peremptory challenges to remove African-Americans from the jury. Prosecutors, in particular, exercised race-based peremptories to remove African-Americans from the jury in criminal cases in which the defendant was African-American. Even after a number of cases, from the mid-1960s to the mid-1990s, in which the Supreme Court developed an elaborate framework to attempt to counter the exercise of race-based peremptory challenges, the practice continues today. Lawyers have simply learned ways to avoid discovery. In some courts in the South, defense lawyers in capital cases will not even challenge the prosecutor's use of a race-based peremptory because they know the judge will never find a peremptory to be discriminatory. The practice of exercising discriminatory peremptory challenges persists, even

though it is undertaken in more subtle ways than it once was.

The Exclusion of Women from the Jury

Women's experience in serving as jurors tracked African-American men's experience in some ways, but lagged behind by many years. Before 1888, women in at least two Western territories were permitted to serve as jurors, and in 1898 women in Utah were permitted to serve as jurors. Wyoming Territory gave women the right to vote and to sit on juries in 1869, with the first woman sitting on a jury in Laramie, Wyoming, in 1871. However, there is some dispute as to when Wyoming women lost their right to sit on juries. Albert Alschuler and Andrew Deiss point to 1872 as the year that "Wyoming's experiment in equality in the courtroom" came to an end, and a *New York Times* article on November 19, 1883, claimed that "no woman [in Wyoming] is ever seen nowadays in the jury box." However, in an article in the *Chicago Daily Tribune* on October 26, 1891, the first Governor of the State of Wyoming was interviewed and said that there had been "several women jurors in the courts of Cheyenne, the Capital of Wyoming." The *Wyoming Almanac of Politics* included an article from the *Cheyenne Daily Leader*, dated September 17, 1891, describing a trial in which the defendant was female as were two of the jurors.

In 1884, women in Washington Territory had the right to vote and to serve on juries. However, in 1887, after a change in personnel on the Supreme Court of Washington Territory, women lost their right to sit on juries. In 1898, Utah allowed women to serve as jurors, and has traditionally been credited as the first state to do so, though women rarely served as jurors until the 1930s.

Although there were few women serving as jurors in the 1880s, there were occasional ruminations about what women jurors would be like and what difference they would make on juries. In a brief note in the *Chicago Daily Tribune* on April 21, 1888, entitled *Call for Feminine Jurors*, the writer suggested that it is difficult to convict a female defendant on the West Coast, and perhaps if women were permitted to serve as jurors this situation would change. The writer offered the following recommendation: "It would be a good thing if the rights of women could be so extended that in cases where a woman is accused of crime she might be tried by a jury of her own sex." On June 28, 1893, there was a brief article in the *Chicago Daily Tribune* entitled *Women as Jurors*, which raised the question whether Lizzie Borden should have been tried by a jury that included women because "a woman on trial for her life should have the right to demand an equal representation of women on the jury." However, the same ar-

ticle also suggested that whenever the defendant is a woman, "there are few men not predisposed to regard the opposite sex with tender consideration." In 1893, the Senate Judiciary Committee held a hearing to consider a bill that would allow women to serve as jurors if they "are wives of men who are duly qualified so to act," according to an article in the *New York Times* on February 1, 1893. The article reported that Dr. Mary Walker spoke in support of the bill, but the bill did not go forward.

Women thought the passage of the Nineteenth Amendment in 1920, which gave them the right to vote, would also give them the right to serve on juries, but this proved not to be the case in most states. According to Professor Gretchen Ritter, around the time of the Nineteenth Amendment, 14 states granted women the right to serve on the jury. In seven of these states, new laws were passed that gave women the right to serve. In the other seven states, jury-qualification statutes described jurors as "electors," so once women became electors under the Nineteenth Amendment, they automatically became eligible to serve as jurors. However, other states, like Illinois, rejected this idea. The Illinois Supreme Court reasoned that at the time when the Illinois General Assembly used the term "electors" only men could be electors. If women were to be included as "electors," then it was up to the Illinois General

Assembly to say so, which it did, though not until 1939.

States decided whether to allow women to serve on juries in their own courts, and the federal courts followed the practice of the state in which the federal court was located. It was not until the Civil Rights Act of 1957 that federal courts allowed women to serve as jurors in federal courts regardless of the practice of that state's courts. State courts, even when they ostensibly permitted women to serve as jurors, followed practices that kept many women from actually serving. In some states, women had automatic exemptions from jury duty. In other states, such as Florida and Louisiana, women could serve as jurors, but only if they went down to the courthouse and affirmatively registered for service, which was an extra step that men did not have to take. States that adhered to this practice claimed that it respected women's role in the home and that most women would be unable to serve because of their duties at home. The effect of affirmative registration was that very few women registered for jury service. As late as 1961, this practice was upheld in *Hoyt v. Florida*, 368 U.S. 57 (1961), and was not found to be unconstitutional until *Taylor v. Louisiana*, 419 U.S. 522, 533 (1975).

Even after the demise of affirmative registration, the exercise of peremptory challenges was another way to keep women from serving

as jurors. Although women were summoned to serve, they could be struck from the petit jury by lawyers exercising gender-based peremptory challenges. Whereas race-based peremptory challenges were addressed by the Supreme Court in a series of cases spanning from the mid-1960s to the mid-1990s, this line of cases did not become applicable to gender until *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). Although there are many reasons that lawyers defend the peremptory challenge—from giving defendants control over jury selection to ridding the jury of an outlier who could not be dismissed for cause—the peremptory challenge also should be seen as a practice that has been, and continues to be, used to keep women and African-Americans from serving on juries.

A Decline in Jury Power

Back in 1888, when African-American men had for all intents and purposes lost their right to serve on juries and the few women in Western territories still had their short-lived right to serve on juries, the jury had begun to experience a decline in power. Whereas the jury—from colonial times until the 1850s—had always had the power to decide the law and the facts, the jury started to lose its power to decide the law and was reduced to deciding only the facts. This loss came about

through state court interpretations of state statutes and constitutions. This loss could be seen in a number of states, including Massachusetts in 1855 and Louisiana in 1871, and soon spread to other states, including Georgia in 1879 and Vermont in 1892. Today, only two states, Indiana and Maryland, still instruct jurors that they have the right to determine the law as well as the facts. Although these two states' constitutions provide for this right, the judiciary in both states has narrowed this right through case law.

My own theory is that as African-American men and women sought to serve on juries, there was a move on the part of judges to limit the power of juries. Some commentators suggest that this move came about because of the growing professionalization of judges. As judges received legal training and saw themselves as professionals, they began to see the functions of judges and juries as distinct, and attempted to limit juries to the fact-finding function only. Another possibility is that as the law grew more complex, it seemed appropriate for professionals with training and knowledge to decide it, rather than citizens who had only common sense and experience to guide them. My own theory is that the move to limit the function of the jury to fact-finding came about at a time when outsiders—women and African-Americans—were trying to claim a right to serve as jurors. Al-

though African-American men and women had not yet been able to secure their right to serve, the writing was on the wall.

Thus, the late 1880s were a time of transformation for the jury. Juries in many states had lost their power to decide the law, and were officially limited to finding the facts. It is no coincidence that this occurred at a time when African-American men and women had experienced the right to serve as jurors, albeit briefly, and sought to recover that right, even though it would take them many years to do so. ♦

Sources and Further Reading

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GIDEON v. WAINWRIGHT.**335****Syllabus.****GIDEON v. WAINWRIGHT, CORRECTIONS
DIRECTOR.****CERTIORARI TO THE SUPREME COURT OF FLORIDA.**

No. 155. - Argued January 15, 1963.—Decided March 18, 1963.

Charged in a Florida State Court with a noncapital felony, petitioner appeared without funds and without counsel and asked the Court to appoint counsel for him; but this was denied on the

Supreme Court decision in Gideon v. Wainwright, 372 U.S. 335 (1963).

CRIMINAL PROCEDURE AND THE SUPREME COURT: THEN AND NOW

David S. Rudstein

After examining the United States Reports containing the cases decided by the Supreme Court during its 1887–88 term, one might conclude that the United States in the late 1880s was a law-abiding country with little crime. Of the approximately 270 cases decided by the Court during that term, only seven (2.6 percent) raised issues of criminal law or procedure. In contrast, in its most recently completed term, 2011–12, the Supreme Court decided 76 cases, 22 (29 percent) of which involved issues of criminal law or procedure.

What accounts for this dramatic rise in the number (and percentage)

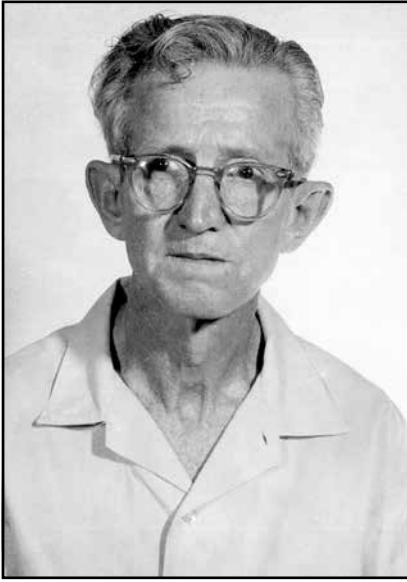
of criminal law or procedure cases decided by the Supreme Court? No one would deny that crime in the United States has increased since 1888. But the true explanation for the increased number of criminal law and procedure cases decided by the Supreme Court is the “constitutionalization” of criminal procedure. When originally adopted in 1791, the Bill of Rights (the first eight amendments to the U.S. Constitution) placed limitations only upon the Federal Government, not upon the individual States. Consequently, none of the rights provided in those amendments—such as the protection against unreasonable searches and seizures (Fourth

Amendment), the guarantee against double jeopardy (Fifth Amendment), the privilege against self-incrimination (Fifth Amendment), the right to counsel (Sixth Amendment), the right to a jury trial (Sixth Amendment), and the right to confront hostile witnesses (Sixth Amendment)—applied in criminal prosecutions brought in state courts. Hence, an individual convicted of a crime in a state court could not challenge his or her conviction in the U.S. Supreme Court on the ground that he or she had been denied a right guaranteed in the Bill of Rights. Many states did of course have their own constitutional provisions guaranteeing various rights to those accused of crime in their own courts, but each state could interpret its own constitutional provisions, and many of these provisions turned out to be less protective of individual rights than their federal counterparts. Moreover, since these were rights guaranteed by *state* law, rather than *federal* law, their alleged violation did not raise a federal issue that could be adjudicated by the U.S. Supreme Court.

Even in 1888, after the adoption of the Fourteenth Amendment—which, among other things, prohibits a State from abridging the “privileges and immunities” of United States citizens (“Privileges and Immunities Clause”) and from “depriving any person of life, liberty, or property, without due process of law” (“Due Process Clause”)—the

Bill of Rights still provided no protection to state criminal defendants.

Shortly after the turn of the twentieth century, the Supreme Court recognized that the Due Process Clause of the Fourteenth Amendment protected *some* individual rights from state infringement, including, perhaps, some safeguarded by the Bill of Rights against National action. Nevertheless, the Court expressly stated that if the Due Process Clause protected such latter rights, it was not because they were enumerated in the first eight amendments. It explained that the Due Process Clause protected only those rights that are “the very essence of a scheme of ordered liberty” and essential to “a fair and enlightened system of justice.” In determining whether a particular safeguard met this standard, the Court asked whether “a civilized system could be imagined that would not accord the particular protection.” Applying this test, the Supreme Court held that several of the protections contained in the Bill of Rights, including the privilege against self-incrimination and the right to a grand jury indictment, did not apply to the States. Even when the Court held that a particular right enumerated in the Bill of Rights fell within the concept of due process, it frequently concluded that the protection afforded against state infringement was less than that afforded against infringement by the Federal Government—a “watered-down” version of the right.



To illustrate, although the Fifth Amendment guarantee against double jeopardy precluded the Government in a federal criminal prosecution from appealing a jury verdict—whether a conviction or an acquittal—that protection did not apply in state court proceedings. Consequently, in the mid-1930s, after a Connecticut jury considering a charge of first-degree murder against Frank Palko convicted him of second-degree murder (thereby implicitly acquitting him of the original charge of first-degree murder), the State, acting pursuant to a state statute, sought review of the conviction. The State claimed the trial judge had erred in instructing the jury on first-degree murder and in excluding certain evidence from the prosecution's case. The Connecticut

Supreme Court agreed; it reversed the conviction (and life sentence) and, despite Palko's implicit acquittal for that offense, ordered a new trial for first-degree murder. At the second trial, a jury convicted Palko of first-degree murder, and he was sentenced to death—a conviction and sentence that the Supreme Court ultimately upheld against a claim that Palko's second trial had placed him twice in jeopardy for first-degree murder.

Throughout the 1940s and 1950s, the Supreme Court consistently rejected the view, persuasively argued by Justice Hugo L. Black, that the Fourteenth Amendment had "incorporated" the entire Bill of Rights and made its provisions applicable to the States to the same extent as they applied to the Federal Government. Even as late as 1961, despite the Sixth Amendment's guarantee that an accused in a criminal prosecution "shall enjoy the right . . . to have the Assistance of Counsel for his defense," an indigent being tried in a state court for a noncapital felony had no federal constitutional right to have counsel appointed to represent him or her. Thus, when Clarence Earl Gideon, an indigent drifter being tried in a Florida state court for breaking and entering a poolroom, requested the trial court to appoint counsel to represent him, the judge could respond:

Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

During the 1960s, however, under the leadership of Chief Justice Earl Warren, the Supreme Court adopted the position that the Due Process Clause of the Fourteenth Amendment “selectively incorporated” various provisions of the Bill of Rights and made them applicable to the States. Using this approach, the Court held that the Fifth Amendment privilege against self-incrimination, the Fifth Amendment guarantee against double jeopardy, the Sixth Amendment right to a jury trial, and, in overturning Clarence Earl Gideon’s conviction, the Sixth Amendment right to counsel were among the rights safeguarded from infringement by the states. In 1968, the Court explained that it had reformulated its test for determining whether a particular provision of the Bill of Rights was incorporated by the Fourteenth Amendment. It stated:

The recent cases . . . have proceeded upon the valid assumption that state criminal processes

are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing virtually contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an *Anglo-American* regime of ordered liberty. [Emphasis added.]

Today, virtually all of the provisions of the Bill of Rights safeguarding the rights of a criminal defendant apply to the States (the lone exception being the right to an indictment). As a result, the Supreme Court each term receives hundreds of petitions requesting it to review a state-court conviction alleged to have been obtained in violation of the defendant’s federal constitutional rights, and each year the Court decides 20 or so cases involving such issues, a large percentage of the number of cases it decides each term with written opinions. ♦

David S. Rudstein graduated with honors from the University of Illinois at Chicago. He received his J.D. cum laude from Northwestern University and his LL.M. from the University of Illinois. After teaching at the University of Illinois for a year, he served as a law clerk to Justice Walter V. Schaefer of the Illinois Supreme Court. He joined the faculty of IIT Chicago-Kent in 1973, serving as Associate Dean from 1983 to 1987. He has focused his scholarship on criminal procedure.



"Our overworked Supreme Court," Puck cartoon by Joseph Keppler, 1885, Library of Congress.

A "PROGRESSIVE CONTRACTION OF JURISDICTION": THE MAKING OF THE MODERN SUPREME COURT

Carolyn Shapiro

The Supreme Court in 1888 was in crisis. Its structure and responsibilities, created a century earlier by the Judiciary Act of 1789, were no longer adequate or appropriate. The Court was overwhelmed by its docket, and the justices' responsibilities, which included circuit riding, were impossible to meet. Shaped as it was by a law almost as old as the country itself, the Supreme Court in 1888—and the federal judicial system as a whole—would be barely recognizable to many today.

The Judiciary Act of 1789 established not only the Supreme Court, but also the entire federal court

system. The Act divided the country initially into thirteen districts, which were in turn combined into three circuits. Unlike today's circuit courts, however, the circuit courts created in 1789 had *original* jurisdiction over certain types of cases and provided appellate review of only a few cases heard originally in the district courts. In addition, the Judiciary Act provided for district court judges and Supreme Court justices, but no circuit court judges. Instead, twice a year, two Supreme Court justices would visit each district and, along with one district court judge, would sit as the circuit court. There were six Supreme Court justices, so

that two could be assigned to each circuit. Even after 1793, when subsequent laws provided that only one Supreme Court justice at a time would sit on a circuit court, meaning that each justice had to make the trip only once a year rather than twice, an enormous portion of Supreme Court justices' time was spent riding circuit—at a time when travel was slow and difficult. And as the country grew, more circuits were created.

Not only did Supreme Court justices ride circuit, but the Supreme Court itself had no discretion over its docket. Cases were appealed to the Supreme Court as of right, unlike today. This lack of control turned out to be extremely problematic. During the first century of its existence, not only did the United States become geographically larger and more populous, but industry grew, the country's economy became increasingly sophisticated, and new laws and sources of litigation abounded, especially after the Civil War. As a result, the Supreme Court's docket grew dramatically. At the beginning of the 1888 Term, there were 1,563 cases on the docket. The Court simply could not keep up. As Felix Frankfurter and James M. Landis described the situation: "The Supreme Court docket became a record of arrears." Less poetically, it took three years for a case to be heard. The situation was untenable.

Faced with overwhelming case-loads, by 1888 the Supreme Court had already attempted to adjust its standard of review in order to dissuade lawyers and litigants from appealing fact-intensive cases with few implications beyond the particular parties. In *Newell v. Norton and Ship*, an 1865 admiralty case involving a steamboat collision, for example, the Court summarily affirmed the verdict for the plaintiff, holding that there was "ample testimony to support the decision." The Court explained that it would not engage in a searching review of the lengthy record, which included more than 100 depositions:

Parties ought not to expect this court to revise their decrees merely on a doubt raised in our minds as to the correctness of their judgment, on the credibility of witnesses, or the weight of conflicting testimony.

The Court's reluctance to engage in error correction, even at a time when it had no formal control of its docket, continues to this day. Today, Supreme Court Rule 10, Considerations Governing Review on Writ of Certiorari, explains that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Despite the Court's effort to define a very narrow scope of review, it was unable to halt the flood of cases coming to it. Facing both its own swelling docket and the geographic expansion of the country, the justices found circuit riding to be increasingly difficult and they often simply did not do it. As Frankfurter and Landis explain, "[B]y 1890 the statutory duty of the Justices to attend circuit was practically a dead letter."

And it was not the Supreme Court alone that was unable to function properly. Despite some earlier attempts to expand and reform the lower courts, there were still not nearly enough judges. Circuit courts, which were supposed to sit with two judges, often had to function with only one. Even more problematic, that single judge was often a district court judge who was hearing appeals of his own decisions. In 1889, a paper presented at the Annual Meeting of the American Bar Association put it this way:

Such an appeal is not from Philip drunk to Philip sober, but from Philip sober to Philip intoxicated with the vanity of a matured opinion and doubtless also a published decision.

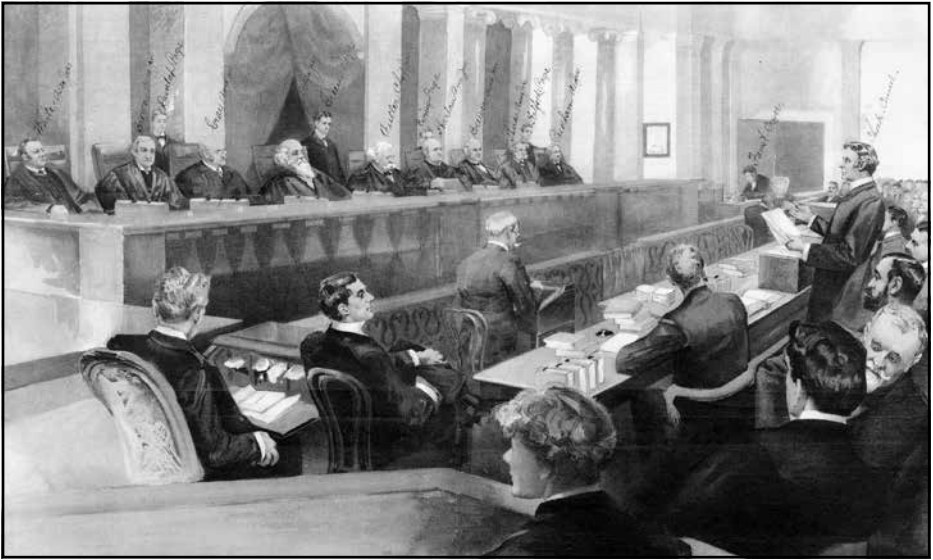
This arrangement could not possibly inspire confidence in an impartial and fair justice system.

Congress finally acted in 1891,

after many years of considering and rejecting proposals for major reform, and the federal judicial system we know today began to emerge. Most significantly, Congress established intermediate appellate courts for the first time. If litigants were required to appeal first to those intermediate courts, the hope was, many fewer of them would subsequently take their cases to the Supreme Court. The law indeed appeared to lessen the tide of cases, at least at first. During 1890, before passage, 623 new cases were docketed at the Supreme Court. In 1892, the number dropped by more than half, to 275.

The 1891 law, known as the Evarts Act, also contained the seeds of today's Court's largely discretionary jurisdiction. For the first time, Congress created a category of cases that the Supreme Court would review only upon certification, or certiorari, although most cases continued to flow to the Court as a matter of right.

The Supreme Court embraced the opportunity to limit the number of cases coming before it. During the first two years after passage of the 1891 act, it granted certiorari in only two cases. While careful to maintain its *power* to grant certiorari in any case pending in the courts of appeals, the Court was, quite deliberately, "chary of action in respect to certiorari," as it explained in *Forsyth v. City of Hammond*, decided in 1897. In *Forsyth*, the Court announced narrow criteria for when



"The Supreme Court/Men Who Know the Law," October Term, 1895. Designed by the American Lithographic Co., 1896, Collection of the Supreme Court of the United States.

certiorari would be appropriate:

[The certiorari] power will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.

These criteria remain, largely unchanged, the stated criteria for certiorari today as set forth in Supreme Court Rule 10.

The Evarts Act, however, was not successful in its goal of cutting the Court's workload to a manageable size. It did not eliminate most

of the Court's mandatory appellate jurisdiction. The hope that the creation of the intermediate appellate courts would satisfy litigants' need for appellate review, thereby making an appeal to the Supreme Court less attractive, proved largely illusory. (Lawyers and litigants often apparently used the right of an appeal to the Supreme Court simply as a delaying tactic, a possibility that seems entirely obvious to a modern legal audience.) In the years following the enactment of the Evarts Act, the Supreme Court's caseloads increased again to unmanageable proportions, as the nation, its economy, and its judicial business continued to grow. Moreover, even after 1891 and despite the concern for the Supreme Court's caseload that inspired the Evarts Act, Congress continued to create even more categories of man-

datory appeals to the Court. In 1903, for example, it passed the Expediting Act, which created the three-judge district court to hear certain anti-trust cases. Appeals from this type of district court went directly to the Supreme Court as of right. And over the following 10 to 15 years, Congress provided that more and more types of cases follow this procedure. (A handful of cases, such as constitutional challenges to congressional districts, are subject to this procedure even today.)

Although it expanded the Court's mandatory jurisdiction in some areas, Congress did cut back on it in others. In 1916, for example, Congress eliminated mandatory jurisdiction over Federal Employers' Liability Act cases, as well as certain cases arising out of state courts, cases from the Philippines, and cases arising under certain other federal statutes. The most significant overhaul of the Supreme Court's jurisdiction, however, was the 1925 Judges' Bill—so called because it was drafted by members of the Supreme Court itself. The Act dramatically expanded the Court's certiorari jurisdiction, leaving only a few, relatively small categories of cases for mandatory appeals.

The goal of the Judges' Bill, like the Evarts Act, was to free the Court from having to decide cases that were not important to anyone beyond the immediate parties involved and to allow it to focus on more nation-

ally significant matters. The House Committee report on the Judges' Bill explained:

The problem is whether the time and attention and energy of the court shall be devoted to matters of large public concern, or whether they shall be consumed by matters of less concern, without especial general interest, and only because the litigant wants to have the court of last resort pass upon his right.

In a 1925 *Yale Law Review* article, Chief Justice William Howard Taft provided more detail about what sorts of cases he believed the Court should take on certiorari after passage of the Judges' Bill, reiterating the criteria the Court first articulated in the 1890s—and that today are embodied in Rule 10:

The function of the Supreme Court is conceived to be . . . the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court. Such cases should include issues of the Federal constitutional validity of statutes, Federal and State, genuine issues of constitutional rights of individuals, the interpretation of Federal statutes when it will affect large classes of people, questions of Federal jurisdiction, and some-

times doubtful questions of general law of such wide application that the Supreme Court may help remove the doubt. Where there is a conflict of opinion between intermediate appellate courts in the different Circuits or between the Federal intermediate appellate courts and the Supreme Courts of the States, the public interest certainly requires that the Supreme Court hear the cases, if its decision will remove the conflict.

The Judges' Bill did not completely eliminate caseload pressures, of course. Petitions for certiorari alone topped 5,000 a year by the early 1980s. In October Term 2011, the Court considered more than 7,500 petitions, although this number represents a modest decrease from prior years. Despite these massive numbers, however, the Court has not fallen behind in dealing with these filings. Instead, it has adopted a variety of ways of dealing with them efficiently—from eliminating the need to discuss a petition in the justices' conference unless at least one justice wants to consider it, to relying on law clerks to read the petitions and summarize them in brief memos. This latter mechanism relies heavily on the "cert pool"—a cooperative agreement among most of the justices (currently, all but Justice Alito) in which the petitions are divided among the chambers and each petition is assigned to a single law clerk. The

cert pool was introduced in the 1970s.

For cases decided on the merits, however, the Court continued to feel greatly burdened by its workload in the mid- to late twentieth century, even as the number of merits cases shrank. In the 1980s, the Court heard argument and issued written opinions in approximately 150 cases a year. Many observers, and some of the justices themselves, believed that 150 cases were simply too many for the Court to handle well. Moreover, these people argued, the Court was unable to give truly important cases the time and attention they needed in part because of the need to manage the mandatory appeals, which were often not of interest beyond the parties themselves. There was much discussion of some kind of national court of appeals or other panel to assist the Supreme Court with the more mundane cases. Then-Justice William H. Rehnquist explained at his 1986 confirmation hearings to be Chief Justice:

I think if Congress could be persuaded, not ultimately but very presently, there ought to be a new national court, frankly recognized as such, with judges appointed by the President and confirmed by the Senate, who would act as something of a junior chamber of the Supreme Court, to hear primarily statutory cases about which there are presently conflicts in the circuit[s].



Photo of Supreme Court Room (in the Capitol), c. 1894, Wittmann Collection, Library of Congress.

As we all know, no such dramatic change occurred. During the 1970s, Congress eliminated mandatory jurisdiction in a number of types of cases, and in 1988, once again at the justices' urging, it eliminated almost all of the remaining direct appeals to the Supreme Court. The Court, freed from mandatory appeals and aggressively applying its certiorari criteria, has been hearing argument in fewer and fewer cases a year. In October Term 2011, for example, the number of cases decided after briefing and oral argument reached the historic low of 65 cases.

Not only do these numbers place the Supreme Court caseload at historic lows, but, as Judge Richard A. Posner has pointed out, when measured as a proportion of all cases in the federal judicial system, the case-

load is vanishingly small. He "compare[s] the percentage just of federal court cases in which the Court granted certiorari in 2004—0.11% (64 divided by 56,396)—with the corresponding percentage in 1960—1.6% (60 divided by 3753)" to find that "the Court reviewed, in relative terms, almost 15 times as many federal court cases in 1960 as in 2004."

Put another way, what Frankfurter and Landis said in 1928 remains just as true today:

Perhaps the decisive factor in the history of the Supreme Court is its progressive contraction of jurisdiction. . . . In contrast with the vast expansion of the bounds of the inferior federal courts, the scope of review by the Supreme Court has been steadily narrowed.

This “progressive contraction,” both of mandatory jurisdiction and of the Court’s exercise of its own discretion to hear cases, has reached a point where the concerns expressed today about the Supreme Court’s workload are unprecedented. Commentators and observers today complain that the Court is not taking *enough* cases and that the justices do not work hard enough. In stark contrast to Chief Justice Rehnquist’s statements at his confirmation hearings, then-Judge John G. Roberts indicated at his hearings in 2005 that he thought there was “room for the Court to take more cases.” Nonetheless, since his confirmation, the Court has not in fact done so. As already noted, the Court decided only 65 cases after briefing and argument in October Term 2011. Whether and how Congress—or the Court itself—will ultimately respond to such complaints and observations, and what the next 125 years will bring, remains to be seen. ♦

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Photo of the Law Library of the Library of Congress in the U.S. Capitol, c. 1895, Library of Congress.

125 YEARS OF LAW BOOKS, 1888–2013

Keith Ann Stiverson

*To attain a competent knowledge of the common law . . .
requires steady perseverance, in consequence of the number of
books which beset and encumber the path of the student.*

—James Kent

James Kent wrote those words in 1826, decrying the fact that more than 600 volumes of English and American case reports and treatises had been published, but not many of them were helpful to the student seeking an understanding of the common law. “Steady perseverance,” to Chancellor Kent, meant setting aside more books than were consulted, to take control of the “indigestible heap of . . . legal authorities.”

The early classes at Chicago-Kent College of Law were taught in judges’ chambers or in law offices, where the library usually belonged to the instructor. Students were often free to use the books, and sometimes could borrow them for short periods of time. The trouble was, everyone needed the same books. The problem was underscored when Dean Langdell’s case method became the dominant means of instruction. Many volumes of case reports had to

be replaced year after year, because the pages where the assigned cases appeared were simply thumbed to death by students: the casebook was born of necessity as much as convenience.

The nineteenth century law schools that merged to become Chicago-Kent College of Law had very small collections of books, but students had access to both the city's public library (founded in 1872) and the Newberry Library, a humanities research collection open to the public that was established in 1887. The only Chicago law library of any size was the Chicago Law Institute Library, which was incorporated by a small group of lawyers in 1857 to serve the needs of the city's growing legal community. The collection consisted of approximately 7,000 volumes and was housed in the Cook County Courthouse, where judges, government employees, and law students were permitted to use the collection at no charge, while local practitioners paid an annual fee of \$100. The Law Institute collection eventually served as the basis for the Cook County Law Library, which is now estimated to have more than 300,000 volumes.

Law book publishing in the nineteenth century was initially based in Albany, New York City, Philadelphia, and Boston, but Chicago also had a share of the industry, including E.B. Myers & Co., a bookstore/office for Lawyers Co-operative

Publishing Company of New York, and the Illinois Book Exchange, which provided student textbooks. The most famous law bookstore of all was "Callaghan's Three Miles of Law Books" at 68 West Washington Street, which eventually became "Miles and Miles of Law Books" in later advertisements when its stock was replaced after the Great Chicago Fire of 1871. Law books were often distributed through the publishers' own bookstores, but Callaghan sold books from many publishers.

It was in the 1880s that American law publishers began to create order out of the "indigestible heap" of law books that was growing very fast as the nation and commerce developed. By then, case reports had been published in the United States for approximately 100 years, but not in a systematic way until West's National Reporter System began in 1879 with the Northwestern Reporter. West was the company that established a real system for publishing cases, and then followed that innovation with the American Digest System. Soon after the Northwestern Reporter began, West took over and improved the *U.S. Digest*, which was previously published by Little, Brown. West's digests and Key Number System enabled lawyers to find what they needed in the rapidly-growing sets of West reporters. The company then answered the needs of lawyers who could not afford (and did not want) the entire national system when it

began publishing state digests and reporters.

As West was inventing a system to grapple with the burgeoning case law, Frank Shepard was inventing the case citator. Shepard's Citations began in 1873 as a service in which adhesive labels were sent to subscribers who affixed them to the pages of published case reports so that the lawyer reading the case could determine whether the court's decision in the case was still "good law" or had been overturned on appeal. Eventually Shepard developed a complicated system of abbreviations to indicate the importance and validity of the case so that a reader knew if the case could be cited as authority for the statement he wanted to make. The awkward method of updating (the gummed labels often dried up and fell off the pages) didn't work very well, so Shepard began publishing his updating system in bound volumes keyed to the various reporters and updated by paperback supplements. The lawyer who needed to determine the history or current status of a case he was reading could simply check by citation. Finally, in the 1980s, the Shepard's Citations system became the extremely current online citator that lawyers use today.

One response to the proliferation of cases was the birth of selective case reporters with so-called annotations, i.e., an explanation that put the case(s) in context and provided a

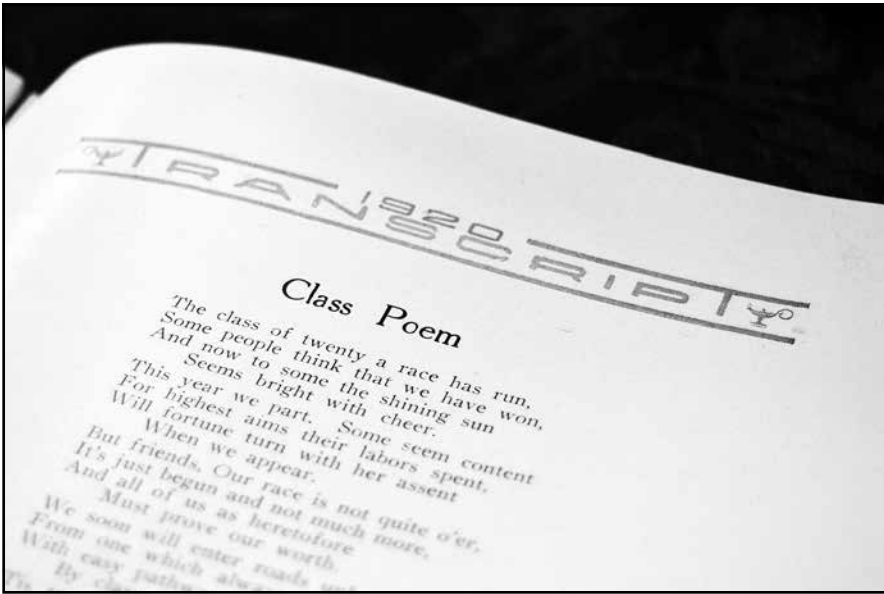
narrative to explain the development of a particular area of law. It was simply impossible for most lawyers to keep up with the massive number of court opinions being published, so the idea of highlighting and explaining only the leading cases had real merit. The earliest of the annotated cases, in the 1880s, were accompanied by short notes; later on, editors wrote hundreds of pages to explain the development and current state of an area of law in multiple jurisdictions.

Another innovation that came from the law book publishers soon after the turn of the century was the specialized loose-leaf service. The first successful one was published by Commerce Clearing House in 1913 after ratification of the Sixteenth Amendment created the income tax. Soon there were other services covering such subjects as trade regulation and banking, then additional areas of law as more publishers entered the field. The most useful of the loose-leaf services brought together in one publication all of the things that a practitioner needed: court opinions, rulings, statutes and regulations, as well as secondary commentary. Many of the services were updated weekly, so the lawyer had less reason to worry that the information he had was out of date. In the 1980s, many lawyers who specialized in a particular area of law welcomed the new CD-ROM format, which made it easy for them to carry around their entire law library.

Judges were not the only busy writers; legislatures, both state and federal, began to pass more laws to deal with the demands of an increasingly complex industrial society. Session laws were often published only at the end of a session of the legislature; these, along with the occasional statutory digest and the various indexes, were not sufficient to make the material available in a timely manner. It was increasingly difficult to piece together the original statute with all of the amendments of later years. *The Revised Statutes of 1873* was a temporary solution to the problem, but it was 1926 before the first publication of the *United States Code*. The Code finally gave lawyers access to federal law in a topical arrangement that was updated. The official Code is republished every six years; the most recent edition consists of more than 200,000 pages. West began publishing an unofficial version of the Code right away, in 1927, called the *United States Code Annotated*. As everyone knows who has done research in federal statutes, West did a faster, better job than the government of publishing the supplementation necessary to keep the Code up to date. Many states also began to compile their statutes into a topical arrangement with an extensive index. Some of these compilations provided citations to cases or short annotations of the court decisions that had construed each section of the statute.

No law library could afford to collect all of the official statutes and court opinions of Federal and state governments, let alone the commercial versions of primary material. The huge wave of secondary legal publications that appeared in response to the New Deal and the eventual specialization of the legal profession made it impossible to build a truly comprehensive collection. The 600 volumes of case reports that once annoyed Chancellor Kent continued to multiply until it eventually became the behemoth that also included thousands of law reviews and legal newspapers. Luckily, the technology we needed and the uniform system of legal citation made it possible to control this enormous mass of material, and to simplify the many elaborate systems that had been created to help the practitioner find the law by subject.

The 1970s and 1980s were decades of real achievement in making the whole body of law and the many secondary sources more readily available in convenient form. The Lexis database was followed eventually by Westlaw, and the two systems have dominated the market for online legal research ever since, despite weak challenges from smaller publishers and from the open access movement. The recent entry of Bloomberg Law/BNA into the online market is the first real challenge to the supremacy of Lexis and Westlaw.



Class poem from *The Transcript*, 1920, Chicago-Kent's student yearbook, photo by Emily Barney.

A collection of historical books named *The Making of Modern Law* (MOML) was an important contribution to law collections several years ago that helped to level the field for new academic law libraries that had few of the older books. MOML is a digital collection of more than twenty thousand nineteenth and early twentieth century treatises and other legal documents that are accessible through Chicago-Kent Library's online catalog. As one flips through the pages of this electronic book collection, it is somewhat surprising to realize that quite often one is looking at images of a print work that was once prized by our nineteenth century faculty and students. An example is Thayer's *A Preliminary Treatise on Evidence at the Common Law*, published at the turn of the last century

and later added to our library's print collection as the 10,510th volume, a work that is still available on a shelf in the library, but also accessible as a full-text e-book that can be read 24/7 by clicking a hyperlink.

Now that our huge collections of print volumes are disappearing from shelves, what will happen next to the academic law book collections that took more than a century to acquire? One can probably predict more offsite storage, more e-books, and more use of print-on-demand options. What was once known as "collection development" in the library has undergone radical change. Acquisition is often temporary, and research materials are not automatically added to the library's permanent collection.

Many law libraries are returning to their roots to make the historical materials of their law schools available. For instance, Chicago-Kent Library is starting a project to preserve the law school's unique historical collections by placing them in a digital repository. The images will reside in the cloud, rather than molding away, page by page, in a dark room. The institutional repository will be the permanent home for (among other things) the early publications and videos of and about the law school. We will be able to tell the descendant of a 1915 graduate where to find the online class photograph that includes his great-grandfather. The nephew of a woman who was the class poet many years ago can now read her work online, because we saved an old student yearbook before it disintegrated.

Today's law student may finish her legal education and then go into the practice of law without ever using a print volume, given the twenty-first century reality that online databases usually contain everything she needs

for research, and client files are often in an electronic knowledge management system rather than in a print file. But if she returns for a law school class reunion in a few years, hoping to relive her triumph at a law student talent show, we hope we'll have a link to the video. ♦

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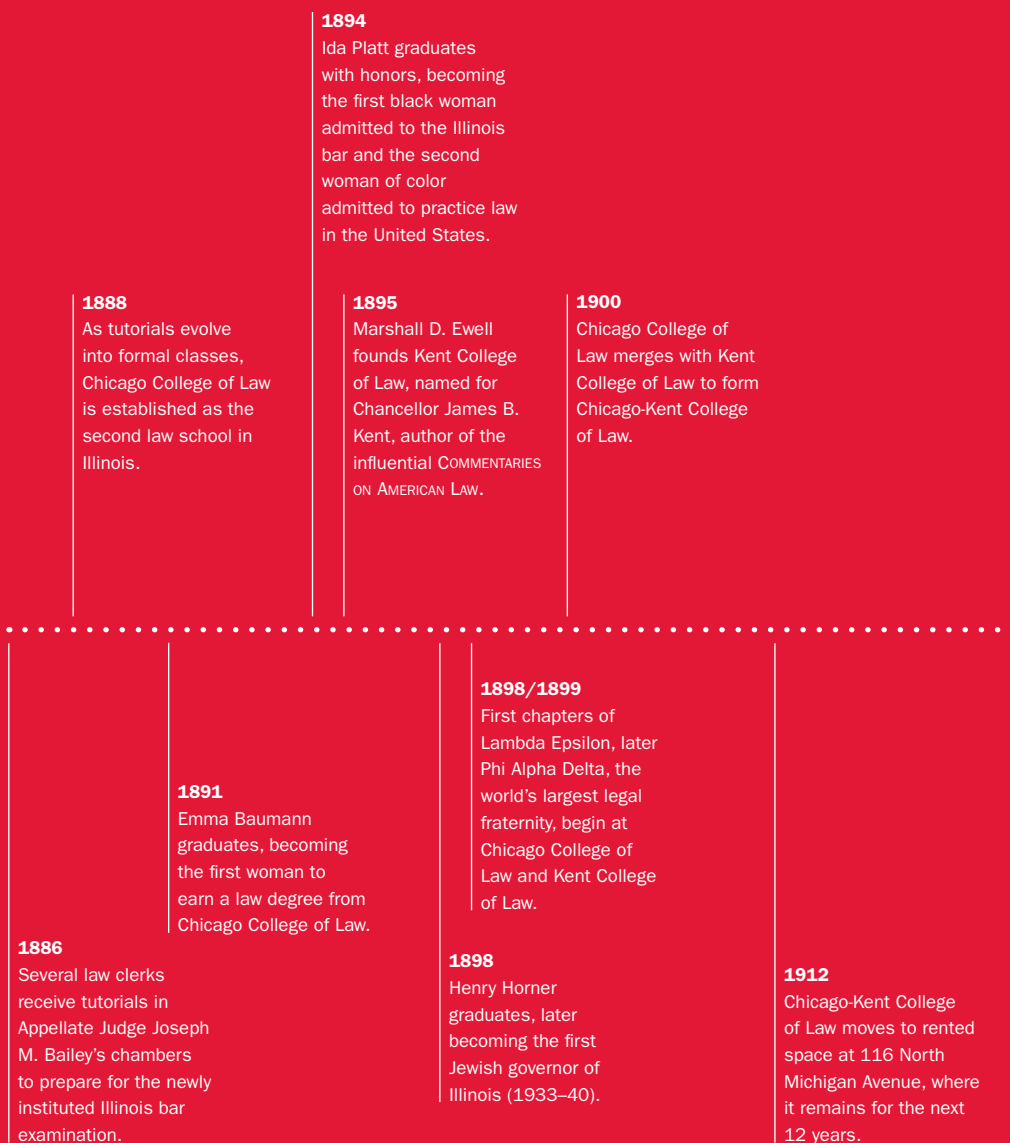
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Keith Ann Stiverson is the Director of the Library at Chicago-Kent. She received her law degree from Georgetown University Law Center and her M.S. in Library Science from Catholic University. Keith Ann was engaged in private practice (municipal bonds) for several years in Cincinnati before leaving to take a position as Special Assistant to the Law Librarian at the Library of Congress. She came to Chicago-Kent in 2001 from the University of Texas at Austin, where she served as Associate Director of the Law Library.

125 Years of Innovation

A Chronology of Law and Progress at IIT Chicago-Kent

I888



1894

Ida Platt graduates with honors
from Chicago College of Law, becoming the
first black woman admitted to the Illinois bar
and the second woman of color admitted to
practice law in the United States.

1924

Chicago-Kent purchases the building at 10 North Franklin Street, which serves as its home for the next 50 years.

1949

Richard B. Ogilvie graduates, later becoming governor of Illinois (1969–73).

1951

More than 500 alumni attend the 65th annual homecoming luncheon at the Sherman Hotel.

1923

The CHICAGO KENT REVIEW (originally the ATHENAEUM LAW BULLETIN; now the CHICAGO-KENT LAW REVIEW) begins continuous publication.

1942–46

School remains open during American involvement in World War II, with a student body roughly a third of its normal size.

1969

Chicago-Kent merges with Illinois Institute of Technology, becoming one of the few U.S. law schools affiliated with a technical university.

1956

Chicago-Kent's Alumni Association is re-formed, and the law school building is expanded and made handicapped accessible.

1970

An issue of the CHICAGO-KENT LAW REVIEW focuses on the work of the U.S. Court of Appeals for the Seventh Circuit, a theme revisited annually until 1989.

1970-73

Enrollment rises from 460 to 750 due primarily to the high percentage of women entering law school.

1976

Chicago-Kent opens the nation's first in-house, fee-generating law school clinic.

1978

The Moot Court Honor Society is founded to provide practical skills training in the foundations of appellate advocacy.

1972

Emerson Blue, the law school's first African-American professor, joins the faculty.

1971

Chicago-Kent establishes its rigorous trial advocacy program, where students gain practical experience in litigation techniques.

1971

Mary Lee Leahy, the law school's first woman professor, joins the faculty.

1978

Chicago-Kent pioneers the nation's first three-year legal research and writing program, now emulated at law schools nationwide.

1977

Chicago-Kent establishes a continuing legal education program.

1976

Chicago-Kent moves from 10 North Franklin Street to 77 South Wacker Drive.

1969

Chicago-Kent merges with
Illinois Institute of Technology,
becoming one of the few
U.S. law schools affiliated with
a technical university.

1976

Chicago-Kent opens the
nation's first in-house, fee-generating
law school clinic.

1983

Chicago-Kent establishes the
Center for Law and Computers,
becoming the nation's first law
school to make computers an integral
part of studying law.

1989

Chicago-Kent establishes a chapter of the Order of the Coif, an honorary scholastic society that encourages excellence in legal education.

1983

Chicago-Kent establishes the Center for Law and Computers, becoming the nation's first law school to make computers an integral part of studying law.

1992

Chicago-Kent opens the "law school of the future" at 565 West Adams Street, making the state-of-the-art building its new home.

1981

Chicago-Kent and IIT establish a joint J.D.-M.B.A. program, the first of many joint-degree options.

1990

Chicago-Kent is named among the top "up and coming" law schools by U.S. NEWS & WORLD REPORT.

1981

Chicago-Kent establishes the Graduate Program in Taxation and the Graduate Program in Financial Services Law, the first such LL.M. program in the United States.

1988

The Chicago-Kent team of Joel Daly '88, Laretta Higgins '88 and Peter Roskam '89 wins the 13th annual National Trial Competition.

1996

Chicago-Kent is named Public Interest Law School of the Year by the Law Student Division of the American Bar Association.

1997

Chicago-Kent launches a student/faculty initiative to use technology to foster the rule of law in emerging democracies.

2000

Chicago-Kent creates the Institute for Law and the Humanities to explore the relationships between law and other humanistic disciplines.

1997

Chicago-Kent and other academic units of IIT create the Institute for Science, Law & Technology to evaluate emerging technologies and their impact on society.

1998

Chicago-Kent receives the ISBA's Access to Justice Special Recognition Award for initiatives that enhance access to the justice system for underserved populations.

1998

Chicago-Kent launches the Honors Scholars Program for students with strong potential to shape the profession's direction.

2002

Chicago-Kent is awarded the 2002 Diversity Award by the Council on Legal Education Opportunity.

2002

The Illinois Technology Center for Law & the Public Interest opens at Chicago-Kent, later becoming the Center for Access to Justice & Technology.

1996

Chicago-Kent launches the Institute for Law and the Workplace, a national center focusing on laws that govern the workplace.

2003

Chicago-Kent alums head the
National Lawyers Association, National
Hispanic Prosecutors Association,
Illinois State Bar Association, Chicago Bar
Association, Women's Bar Association of Illinois,
Cook County Bar Association, Illinois
Judges Association, and Black Women Lawyers'
Association of Greater Chicago.

2008

Chicago-Kent becomes the first law school to win both the National Trial Competition and the National Moot Court Competition in the same year. The team of Joshua Jones '08 and Mark Griffin '08 took the trial competition honors; the team of Lalanía Gilkey-Johnson '08, Joanna Brinkman '09 and Rachel Moran '08 took the moot court honors.

2003

Chicago-Kent alums head the National Lawyers Association, National Hispanic Prosecutors Association, Illinois State Bar Association, Chicago Bar Association, Women's Bar Association of Illinois, Cook County Bar Association, Illinois Judges Association, and Black Women Lawyers' Association of Greater Chicago.

2007

Chicago-Kent and other IIT units create the Center for Diabetes Research and Policy to advocate for people with diabetes and to develop new treatments and preventions.

2009

The Chicago-Kent team of Brody Dawson '09, Andrew Booth '09 and Betsy Gates '09 wins the 59th annual National Moot Court Competition.

2003

Chicago-Kent establishes the country's first LL.M. program in international intellectual property law.

2010

The Oyez Project, a multimedia archive devoted to the U.S. Supreme Court and its work, moves to Chicago-Kent.

2008

Chicago-Kent becomes the first law school to win both the National Trial Competition and the National Moot Court Competition in the same year.

2007

The Chicago-Kent team of Keya Rajput '07 and Joshua Jones '08 wins the 32nd annual National Trial Competition.

2007

Roy C. Palmer '62 and Susan M. Palmer establish the IIT Chicago-Kent College of Law/Roy C. Palmer Civil Liberties Prize to honor scholarship exploring the tension between civil liberties and national security.

2010

Chicago-Kent establishes the Jury Center, later renamed after Justice John Paul Stevens.

2011

Chicago-Kent establishes its first endowed chair, named in honor of Professor Ralph Brill, and installs Professor Adrian Walters of Nottingham Trent University.

2013

Chicago-Kent opens the Center for Empirical Studies of Intellectual Property to promote application of quantitative and qualitative social science methods to questions of innovation and creativity.

2012

Chicago-Kent launches the Institute for Compliance, dedicated to preparing students for careers in financial compliance.

2012

Chicago-Kent creates the Center for Information, Society and Policy to address privacy and information security issues raised by information technologies.

2011

Chicago-Kent establishes the Institute on the Supreme Court of the United States to promote education about the Court and its role in our constitutional system of government.

2013

IIT Chicago-Kent Faculty

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Professor of Legal Research and Writing

Lori B. Andrews
Distinguished Professor of Law

Bernadette Atuahene
Associate Professor of Law

Kimberly D. Bailey
Assistant Professor of Law

Katharine K. Baker
Professor of Law

Felice Batlan
Associate Professor of Law

William A. Birdthistle
Associate Professor of Law

Alexander A. Boni-Saenz
Assistant Professor of Law

Fred P. Bosselman
Professor of Law Emeritus

Ralph Brill
Professor of Law

Evelyn Brody
Professor of Law

Bartram S. Brown
Professor of Law

Gerald Brown
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Sungjoon Cho
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